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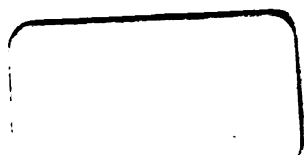
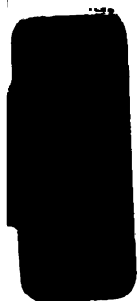
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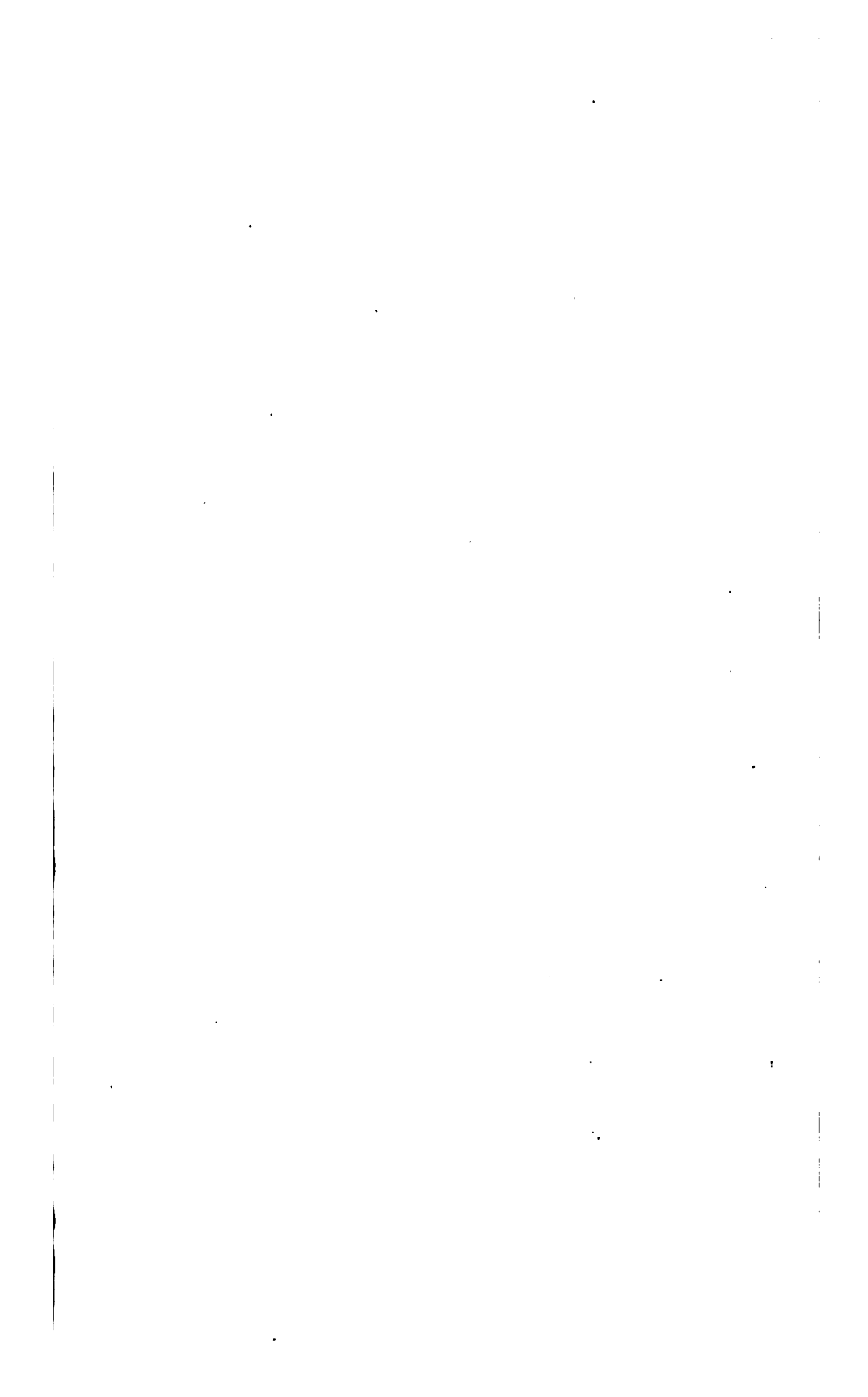
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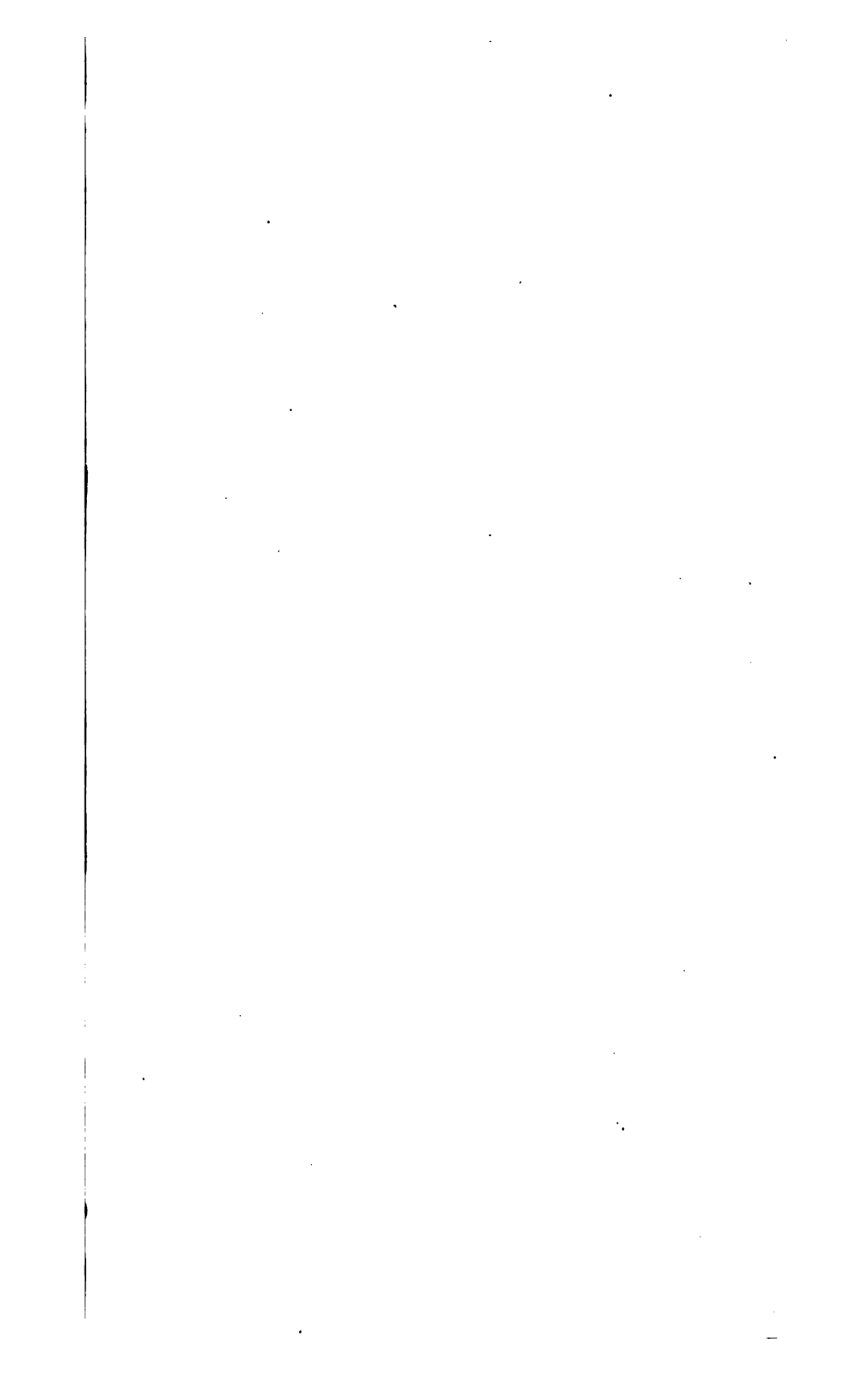


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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

ISAAO GRANT THOMPSON

VOL. I.

INCLUDING CASES DECIDED IN THE COURTS OF MARYLAND,
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HON. JOHN M. ROBINSON,

HON. RICHARD GRASON,

HON. RICHARD H. ALVEY,

HON. OLIVER MILLER,

HON. MADISON NELSON,

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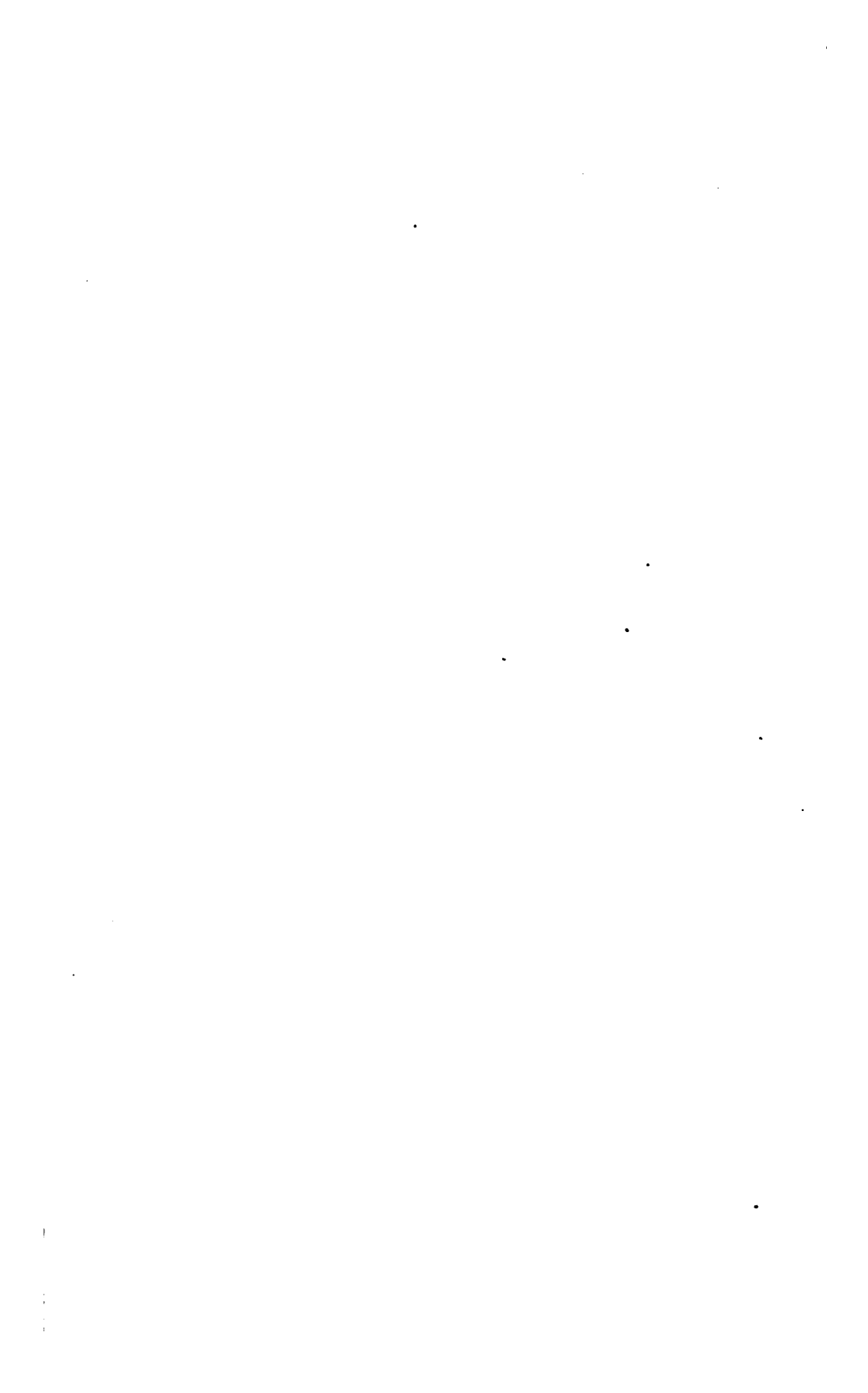
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CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

PEOPLE'S BANK OF BALTIMORE, appellant, v. BROOKE

(31 Md. 7.)

Notarial protest — its contents.

A protest of a notary is *prima facie* evidence of the truth of its statements, and, when exclusively relied on to prove the necessary facts, must contain sufficient averments that every thing requisite has been done to authorize the demand upon the indorser.

When the protest merely states that the note was presented for payment, but does not say *where*, the statement is insufficient to charge the indorser.

APPEAL from circuit court for Prince George's county.

The action was *assumpsit* on a note indorsed by appellee. The facts sufficiently appear in the opinion.

Thomas F. Bowie, for appellant.

Henry M. Murray, for appellee.

STEWART, J., delivered the opinion of the court.

The single inquiry presented by the two exceptions, in this case, is as to the sufficiency of the proof furnished by the notarial protest to fasten liability upon the appellee, as the indorser, for the payment of the note upon which this suit was instituted.

The protest of the notary was the only evidence relied upon by the appellant to establish due demand of payment of the note, its

MARYLAND,

People's Bank of Baltimore v. Brooke.

by the maker, and legal notice given to the appellee or the

amounts to just as much proof as would have been the testimony of the notary, or any other credible witness, if he had been present at the trial, and testified to the same facts certified to in the protest.

It is *prima facie* evidence of the truth of its statements, and where the protest is exclusively relied upon to prove the necessary facts to fix liability upon the parties to be affected, it must contain sufficient averments to them, that every thing requisite has been done on the part of the holder of the note, or his agent, to authorize the demand upon the indorser.

The certificate of the notary, in this instance, does not furnish the indispensable evidence of compliance with the conditions incident to the contract, to render the appellee as indorser responsible for the payment of the note.

"The commercial law, which, throughout all its departments, inculcates the doctrine of reasonable diligence, and frowns upon and discourages *laches*, has introduced a rule of great strictness on this subject, which, although it may sometimes be found harsh in its practical operation, yet is, for the general purposes of business, highly useful to the commercial community, by introducing promptness, fidelity and exactness, in the demand of payment." Story on Pro. Notes, § 201.

The sufficiency of the proof by the protest, according to the commercial law, is to be tested in its application to the case of an indorser.

According to the requirements of this law, the indorser contracts to be liable for the payment of the note, in case of its dishonor, if it is duly presented for payment according to its terms, and due notice is given to him of its dishonor, and not otherwise.

"The engagement of the indorser is conditional, and any neglect or *laches* of the holder, in not making due presentment, will discharge him." Story on Pro. Notes, § 198.

In order to charge the indorser, it is indispensable that the presentment of the note for payment should be made at the place designated in the note, and it is necessary to prove that the presentment was there made, otherwise the indorser will be absolutely discharged. Story on Pro. Notes, § 230; Byles on Bills, 169.

"It will be sufficient, indeed, if the notice sent, necessarily, or

People's Bank of Baltimore v. Brooke.

even fairly, implies, by its terms, that there has been a due *presentment* and dishonor at the maturity of the note. *statute*

"But mere notice of the fact, that the note *has not been* *costs* affords *no proof whatsoever* that it *has been presented at all*, to may be that the holder means to rely upon some legal excuse *of* non-presentment." *Graham v. Sangston*, 1 Md. 68; Story on Pro Notes, § 350.

In the case where the note is in terms payable at a bank, as is the one now in question, it is sufficient if the note is in bank at maturity, ready to be delivered on payment, should the maker come to pay it. *Graham v. Sangston*, 1 Md. 68.

"The court will lay hold of any expression in the notice which might fairly be presumed to indicate that a due presentment or dishonor had taken place, and that the notice was designed to put that fact as the ground of the liability." Story on Pro. Notes, § 352.

Giving the most liberal interpretation to the notarial protest, in this case allowable, under the commercial law, regarding the relative rights of the holder and indorser of the note, and assuming that all the statements of the protest have full effect, and the supposed interlineation referred to in the second exception was not made, and whether there was an interlineation or not we do not consider material in this case, it is not shown by the protest that the presentment of this note was made at the bank for payment at its maturity, or that the note was left at the bank for payment.

It is merely stated that the note was presented, and it is very possible that this may have been at the bank, but this is mere conjecture, and does not amount to proof.

It does not appear where it was presented for payment, but it could not have been to the makers, because the protest states that notice was sent to them at Upper Marlborough.

No legal inference can be deduced from the statements of the notarial protest that there was a due presentment of the note for payment at the bank, where, by its terms, it was to be presented, and the court below committed no error in regarding it as totally insufficient, and instructing the jury accordingly.

Judgment affirmed.

MARYLAND,

Green v. Drummond.

GREEN, appellant, v. DRUMMOND *et al.*

(31 Md. 71.)

*Statute of frauds. Resulting trusts.**

An agreement, whereby G. and D. agree to become jointly purchasers of certain real estate, each party to furnish one-half the purchase money, and to hold the same in undivided moieties, is within the fourth section of the statute of frauds, and if not evidenced by some memorandum in writing, signed by the party to be charged, will not be enforced.

Where in pursuance of such an agreement, a purchase was made in the name of D alone, although G. advanced a portion of the purchase money, a conventional trust that could be enforced was not created, the same being within the provisions of the seventh section.

There being no deed or conveyance of the legal title to D., while the contract of purchase remained executory, no resulting trust within the meaning of the eighth section of the statute could arise in favor of G.

But the court of equity may, in cases where the party is not entitled to specific performance, grant relief by decreeing the repayment of the money expended on the faith of the contract.

APPEAL from the superior court of Baltimore city, sitting in equity.

It appears from the bill of the appellant, that one Silver and others, executors, etc., sold by auction to Kimberly Bros. certain real estate for the sum of \$16,000; that the said Kimberly Bros. agreed to relinquish their rights in favor of Levin J. Drummond, since deceased, appellees' testator, whereupon Cornelius Green, the appellant, and the deceased, agreed to become purchasers, each party to furnish one-half the purchase money, and to hold the property in undivided moieties. The agreement was a verbal one, and not evidenced by any writing.

The deceased was unable to furnish immediately his portion of the money required by the terms of sale, and the executors, in consideration that \$10,000 should be paid within a short time, and the balance in twelve months, agreed that deceased should be substituted as purchaser, to which Kimberly Bros. consented. The \$10,000 was paid — \$6,000 by appellant and \$4,000 by deceased. The sale was reported by the executors, as made to deceased, who was named as purchaser.

* There has been no legislative re-enactment of the statute of frauds in Maryland, and the provisions of the English law (29 Car. II. cap. 3) are still in force. *Sibley v. Williams*, 3 Gill and Johnson, 68. See also Maryland Constitution, § 5, which, though adopted since the above action was commenced, is merely declaratory of the previously existing law.—RMR.

Green v. Drummond.

All these facts seem to have been substantially proved. The appellees relied upon, and pleaded, among other things, the statute of frauds. The bill was dismissed, in the court below, with costs.

Wm. Pinkney Whyte and *Wm. Mead Addison*, for appellant.

H. L. Emmons and *Wm. Shepard Bryan*, for appellees.

BARTOL, C. J., delivered the opinion of the court.

There can be no doubt that the alleged agreement between Green, the appellant, and Levin J. Drummond, as set out in the bill of complaint, was an agreement within the fourth section of the statute of frauds.

The allegation in the bill is, "that Green and Drummond agreed to become jointly the purchasers of the property, each party to furnish one-half of the purchase money, and to hold the same in undivided moieties." The purchase was made in the name of Drummond alone, who was reported by the executors as the sole purchaser, and the sale was ratified as made to him, Green being no party to the contract made with the executors, nor in any manner known to them as purchaser; his alleged agreement was made with Drummond, and, as stated in the bill, was a mere parol agreement, not evidenced by any writing.

This brings the case precisely within the ruling of this court in *Hollida v. Shoop*, 4 Md. 465; and within the case of *Parker v. Bodley*, 4 Bibb, 102, which was cited and adopted in *Hollida v. Shoop*, 4 Md. 474. It is unnecessary to refer to other authorities in support of the position that contracts to purchase land, are within the fourth section of the statute, and can be evidenced only by some note or memorandum in writing, signed by the party to be charged therewith.

If the case of the appellant rested only upon the alleged agreement, he must fail in maintaining his bill upon parol evidence merely. But it has been contended that, upon the pleadings and proof, there was a trust created in favor of the appellant; the effect of the agreement being, as alleged, to charge Drummond, as trustee of the appellant, to the extent of one moiety of the land. Here we are met by the provisions of the seventh section of the statute, which declares that "all declarations or creations of trusts, or confidences of any lands, etc., shall be manifested and proved by some writing, etc., or else they shall be utterly void and of none effect."

Under this section it is not competent to prove by parol an express or conventional trust. As decided in *Dorsey v. Clarke*, 4 H. & J. 556, "if a party who buys land agrees by parol to hold it for another, or to give that other the benefit of the purchase upon the payment by him of the purchase-money, such a conventional trust could not be enforced. It would be within the statute, and could be evidenced only by writing."

Is this a case of a constructive or resulting trust within the saving of the eighth section of the statute?

Upon this question we have had more difficulty in arriving at a satisfactory conclusion. It is very clearly established by the evidence, that, at the time the arrangement was concluded with the executors, under which Drummond was accepted by them as the purchaser, and \$10,000 of the purchase-money was paid, a considerable part of the money so paid was furnished by Green, the complainant; not as a loan to Drummond to be repaid, but as part of the purchase-money, with the intention of securing to Green an interest in the property as part owner.

It has been argued that the effect of this transaction was to create a resulting trust in the property in favor of Green, to the extent or in the proportion of the money so paid or furnished by him, thus bringing the case within the provisions of the eighth section of the statute; it being well settled that such constructive or resulting trusts, arising by operation of law, may be proved by parol evidence. The language of the eighth section is as follows:

"Provided always, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise, or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, any thing hereinbefore contained to the contrary notwithstanding."

One of the classes of trusts coming within the purview of this section is thus defined:

"Where, upon a purchase of property, the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a presumptive or resulting trust immediately arises by virtue of the transaction, and the person named in the conveyance will be a trus-

tee for the party from whom the consideration proceeds." Hill on Trustees, 92, m. "In such case the payment of the consideration money may be proved by parol, as before the statute. The payment of the money is the foundation of the trust." 4 H. & J. 556.

We consider it well settled, upon reason and authority, that, if a part of the purchase-money be so paid, there will arise in the same manner a resulting trust *pro tanto* in favor of the party so paying. But the question here presented is, whether a trust of this kind can arise upon an executory contract merely; or where there has been no conveyance of the legal title.

The judge of the superior court decided that, there being no deed or conveyance of the legal title from the executors to Drummond, a resulting trust could not arise under the eighth section of the statute.

A very full and careful examination of the authorities has convinced us that the decision of the judge below on this question is correct.

The words of the statute seem plainly to apply only to cases where "*a conveyance shall be made of lands.*" Trusts of this description "*must arise, if at all, at the time of the execution of the conveyance.*" In all cases there must be a mutation of the legal title, and the trust arises by operation of law "from contemporaneous circumstances, giving a different direction to the equitable title from that taken by the legal title."

In support of these positions the following authorities may be cited: 3 Sug. on Vendors, 174, note 1; Lewin on Trusts, ch. 8, p. 176; *Dyer v. Dyer*, 2 Cox, 92; *Jackson v. Morse*, 16 Johns. 199; *Murray v. Rogers*, 3 Paige, 398; *Page v. Page*, 8 N. H. 187; *Baker v. Vining*, 30 Maine, 121; *Dorsey v. Clarke*, 4 H. & J. 551.

The contract of purchase by Drummond from the executors, and the ratification of the sale by the orphans' court, gave him only an equitable interest in the land; to convey the legal estate a deed from the executors is necessary; and until the whole purchase-money is paid they are not bound to execute a deed. While the contract of purchase remained executory, and before the conveyance of the legal estate to Drummond, no resulting trust within the meaning of the eighth section of the statute could arise or be created in favor of Green.

The case of *Cecil Bank v. Snively*, 23 Md. 253, has been cited, and relied on by the appellant in support of the position, that such a trust may arise upon an executory contract of sale, without a conveyance.

In that case an attachment upon judgment against Lee & Welby was laid upon property claimed by Lawrence Snively, under a contract of purchase by him from Price and Ridgway, trustees, to whom it had been conveyed by Lee & Welby, with power to sell.

The evidence was that Snively, though nominally the purchaser, had, in fact, bought for Lee & Welby; that they furnished and paid all the purchase-money, so far as it had been paid, and that Snively stated he claimed no interest in the property, and held the contract only for the benefit of Lee & Welby. The effect of the decision was, that this evidence was sufficient in law to show that Lee & Welby had an interest in the property liable to the attachment. In the argument of the case the interest of Lee & Welby was treated as a trust created by construction or operation of law; no point was made upon the words of the statute, as to the effect of the absence of a conveyance; in the opinion that fact was not adverted to, and the general principles applicable to such trusts were stated and discussed, perhaps unnecessarily, as they were not essential to the decision of the case.

There could be no doubt of the right of the attaching creditors to treat the property as in fact belonging to Lee & Welby, who, according to the proof, were the real purchasers, Snively being merely a nominal purchaser, and holding the contract for their benefit. It would have been a fraud upon the creditors to have denied to them the benefit of their attachment.

The judgment in *Cecil Bank v. Snively* stands upon grounds independent of the eighth section of the statute of frauds, and is not in conflict with the principles here announced as governing the construction of the statute.

It follows from what has been said—

1st. That the appellant is not entitled to claim a specific execution of the agreement, whereby, as alleged in the bill, it was agreed between him and Drummond that he should become a joint purchaser of the property, and hold to the extent of one moiety. Such an agreement, under the statute of frauds, can be proved only by writing.

2d. It also follows, for the reasons before stated, that the appellant is not entitled to relief upon the ground of a resulting or constructive trust in the property, under the eighth section of the statute.

It remains to be considered whether, under the pleadings and proofs in the cause, the appellant is entitled to any, and what, relief in a court of equity.

A specific execution of the alleged agreement being denied, the question is, whether the bill should be retained for the purpose of awarding compensation for the purchase-money paid and advanced by him?

It has been said to be a general rule of equity that "no one shall avail himself of a law made for his protection so as to injure another, and, especially, not to enrich himself at his expense." 3 Rand. 258.

"The statute of frauds was intended to protect parties against feigned or incomplete agreements. But, when one party induces another, on the faith of a parol contract, to place himself in a worse situation than he would have been if no agreement had existed, and especially if the former derives a benefit therefrom, at the expense of the latter, and avails himself of his legal advantage, he is guilty of a fraud, and uses the statute for a purpose not intended, the injury of another for his own profit. The fraud does not consist in availing himself of the statute to protect himself, but in using it to appropriate to himself what justly belongs to another." 3 Rand. 259.

To prevent such injustice, courts of equity, in cases where the party is not entitled to specific performance, often grant relief by decreeing just compensation; that is, by decreeing the repayment of the money expended on the faith of the contract. Many cases might be cited in which such relief has been granted.

Some conflict has arisen upon the question as to the particular circumstances under which a court of equity will entertain jurisdiction and grant relief, by awarding compensation to a party who fails to maintain his bill for specific performance. "Such relief," as stated by Judge STORY (2 Eq. J. § 794), "is, ordinarily, to be decreed in equity only as incidental to other relief sought by the bill and granted by the court, or where there is no adequate remedy at law, or where some peculiar equity intervenes."

In this case it seems to us doubtful whether the appellant could, by any proceeding at law, recover the money paid and advanced by him under the contract; for there he would be met by the provisions of the statute, which would preclude him from giving evidence of such parol contract.

The money not being advanced as a loan to be repaid, but expended in pursuance of the agreement for the joint purchase of land, in order to maintain an action at law to recover back the money, it would be necessary to prove the contract under which it was paid, which he would be precluded from proving by parol, by

reason of the provisions of the statute, and thus his remedy at law might fail and justice be denied." 3 Rand, 259, 260; *White, adm'r*, v. *Coombs, ex'r*, 27 Md. 489.

In such case, according to the authorities, a court of equity ought to give relief, because there is no remedy at law, or a very inadequate and precarious one.

In *White & Tudor's Leading Cases in Equity* (65 Law Lib. 587), the rule upon which courts of equity proceed in such cases, is thus stated:

"When the specific execution of a parol agreement cannot be decreed in consequence of the uncertainty in its terms, or of the statute being relied on, the court will, if there is no remedy at law, or it is uncertain or embarrassed, or under circumstances of special equity, decree compensation to the extent of the purchase-money paid, and the value of beneficial and lasting improvements."

This proposition was cited with approbation by the court of appeals in *Bowie v. Stonestreet*, 6 Md. 431. The relief granted in that case was based upon this principle of equity.

In *Phillips v. Thompson*, 1 Johns. Ch. 131, and *Parkhurst v. Van Cortlandt*, id. 273, which were bills for specific performance, Chancellor KENT, though denying the relief prayed in the former, because the plaintiff failed in proving the agreement, and in the latter because the proof of the agreement was imperfect, yet retained the bills in both cases, and in one directed an issue of *quantum damnificatus*, and in the other referred the case to a master, to ascertain the amount due for expenditures made on the faith of the contract, so that compensation might be decreed. The case of *Parkhurst v. Van Cortlandt* was cited by the court of appeals in *Bowie v. Stonestreet*, and the principles therein asserted were recognized.

The court of appeals proceeded upon the same principle in awarding compensation in the case of *Eakle v. Eakle*, decided at April term, 1867, and in the more recent case of *Nelson v. Hagerstown Bank*, 27 Md. 52, 76.

We refer also to *Anthony v. Leftwitch*, 3 Rand, 238; *Payne v. Graves*, 5 Leigh. 561; *Johnston v. Glancy, and others*, 4 Blackford, 94, 99; *King's Heirs v. Thompson and wife*, 9 Peters, 204; and to the cases cited by Chancellor KENT in *Parkhurst v. Van Cortlandt*.

These authorities sufficiently establish the jurisdiction and power of a court of equity to grant relief to the appellant, in the present case, by decreeing compensation.

The measure of compensation to which he will be entitled is a decree for the money paid and expended by him in the purchase of the property, with interest thereon.

While, in our opinion, the proof is perfectly clear and conclusive that a portion of the cash payment made to the executors was furnished by him, and that the amount so furnished exceeded \$3,000; there is an absence of satisfactory evidence with regard to the precise amount thereof, and it will be necessary to refer the case to the auditor, so that an account thereof may be stated upon the proof now in the cause, and other proof to be taken under the court's order for that purpose; and for the amount so ascertained, with interest thereon, the appellant will be entitled to a decree as against the personal representative of Levin J. Drummond, deceased; and in default of payment thereof out of the personal estate of Levin J. Drummond, he will be entitled, as a general creditor, by proper proceedings for that purpose, to enforce its payment out of the real estate of said Drummond, in the same manner as any general creditor might do. Inasmuch as we have determined that the property mentioned in the proceedings is not chargeable with any trust in favor of the appellant, it follows that he is not equitably entitled to any specific lien thereon for the amount so to be recovered by him. But, as was decided in the case of *Bowie v. Stonestreet*, he is to be considered as a general creditor against the assets of the estate, for the amount which may ultimately be decreed to be due him upon the principles before stated.

And forasmuch as the appellant is not entitled to any relief as against the defendants Benjamin Silver, James Silver and Silas B. Silver, executors, the bill as to them must be dismissed, and the decree of the superior court, so far as it dissolved the injunction heretofore granted, ought to be affirmed. But as there was error in dismissing the bill, the decree, in that respect, will be reversed, and in order that further proceedings may be had in the court below, in accordance with the opinion of this court, the cause will be remanded.

Affirmed in part, and reversed in part, and cause remanded.

MIMS, appellant, v. ARMSTRONG *et al.*

(31 Md. 87.)

Deeds — Construction of schedule in.

An insolvent debtor made a deed of assignment, wherein it was recited that the assignor "is indebted to divers persons, etc., and is desirous of providing for the payment thereof by assignment of *all* his property." And in the granting clause the property was described as "all his goods, etc., *chooses in action*, and property of every name and nature whatever belonging to him, and which are more particularly and fully enumerated in the schedule hereto annexed, marked schedule A."

Held, that the general words of the deed were limited and controlled by the schedule, and that a sum of money not named in the schedule did not pass to the assignee under the deed.

APPEAL from superior court of Baltimore city.

One McNabb, residing in South Carolina, being insolvent, made a deed of trust to the appellant (Mims) for the benefit of his creditors. Annexed to this deed was a schedule, in which was enumerated certain property and money. All of this property and money was received by the assignee, who disposed of the property, and from the proceeds and the money received from the assignor divided to the creditors, under direction of a committee thereof, sixteen and two-thirds per cent of their claims.

Afterward, one Walker, at the request of certain creditors, among whom was one of the appellees, followed McNabb, and, meeting him in San Antonio, Texas, compelled him to surrender a sum of money in his possession, which was subsequently divided among four firms, including, to whom McNabb was indebted, the firm composed of the appellees, paying their respective claims in full. The appellees, upon receiving payment in full of their debt, returned to the committee of creditors the dividend previously received. The appellant claimed that the money collected by Walker was a part of the assets of McNabb, which passed under the deed of trust, and brought this action to recover the portion of such money received by the appellee.

The verdict and judgment in the superior court was in favor of the defendant.

Robert A. Dobbin and *George Wm. Brown*, for appellant.

Wm. Henry Norris and *I. Nevett Steele*, for appellees.

Mims v. Armstrong.

ALVEY, J., delivered the opinion of the court.

This is an action for money had and received, instituted by the appellant against appellees, to recover money received by the latter in payment of a debt due them, alleged to have been assigned to the former by previous assignment of the debtor.

The prayer of the plaintiff, which was refused, asked the court to instruct the jury that, if they found the fact of the execution of the deed of assignment, given in evidence; and that the defendants were creditors of McNabb, the assignor at the time of the execution of such assignment; and that Walker, the witness, obtained from McNabb certain money, as stated by him in his evidence, and out of such money paid to the defendants the entire debt which McNabb owed to them; and that the money which Walker so obtained from McNabb belonged to McNabb, or was the proceeds of property which belonged to him at the time when he executed the deed of assignment; then such money, by virtue of such deed, passed to the plaintiff, and he is entitled to recover from the defendants the amount which they so received from Walker, less the amount which they have paid to the plaintiff, with interest.

By the granting of the defendants' prayer, the court instructed the jury that, by the deed offered in evidence, nothing was conveyed to the plaintiff by McNabb, except property enumerated in the schedule annexed thereto; and if the jury believed that all such property was received by the plaintiff, and that no part thereof, or its proceeds, was in the possession of the defendants when this suit was brought, then their verdict should be for the defendants.

The deed referred to was an assignment by McNabb, a defaulting debtor to the plaintiff, as trustee, for the benefit of creditors; and the first and most material question is, whether the money alleged to have been received by the defendants, subsequent to the making of the deed, in discharge of their prior claims against McNabb, was part of the property conveyed by the deed of assignment to the plaintiff; for, if not, there is no color of right in the plaintiff to maintain the action, and it would follow necessarily that the court was right in rejecting the prayer of the plaintiff, and in granting that of the defendants.

The deed, in its recital, states that McNabb, the assignor, "is indebted to divers persons in divers sums of money, which, by reason of sundry losses and misfortunes, he has become unable to pay in full, and is desirous of providing for the payment thereof, as far as

he can, in a just and equitable manner, by assignment of *all* his property and effects for that purpose." And, in the granting clause, the property is described as "all and singular his goods, chattels, promissory notes, debts, wares, merchandise, securities and vouchers, for and affecting the payment of money, claims, demands, *choses in actions*; and property of every name and nature whatever, of and belonging to him, *and which are more particularly and fully enumerated in the schedule hereto annexed, marked schedule A.* To have and to hold," etc. The schedule referred to is annexed to the deed, and was signed, sealed and delivered by McNabb in the presence of witnesses, and with all the formalities of the deed, and was duly proved and admitted to record with the deed, of which it formed part, according to the law of South Carolina.

In this schedule, thus executed, the only money mentioned is the sum of \$3,944, which is admitted by the plaintiff came into his hands; and it is conceded that the money, \$8,352.35, obtained from McNabb by Walker, under the circumstances detailed in evidence, and out of which the defendants' claim was paid, is not embraced in the schedule. But it is contended that, notwithstanding this sum of \$8,352.35 was omitted from the schedule, yet it passed to the plaintiff under the general and comprehensive terms used in the granting clause of the assignment, and that the defendants have no right to retain the amount received by them in discharge of their claim against McNabb.

Did the right to this money pass to the plaintiff under the deed? We think, upon a proper construction of the instrument, it did not.

It is now settled, by all the authorities upon the subject, that a schedule, executed and referred to as in this case, forms a part of the deed; and that being so, the well-established rule of interpretation is applicable, that where general words are followed by a special clause, the latter will restrain and limit their operation. It is a general rule, regarded as well established even before the time of Lord BACON, that where the instrument contains, in the first instance, a good and certain description of the thing granted, a subsequent mistake as to names, quantity, location, or some mere incident, will not be allowed to vitiate the grant. The subsequent mistaken description will be rejected upon the principle of *falsa demonstratio non nocet*. But where the subject of the grant is first described *generally*, and afterward a particular description is added, that will, if it can be reconciled to what precedes it restrain and

limit the operation of the more general words of description. Shep. Touch. 88; Com. Dig. "Parols" (A. 7, 8). Or, as the rule is stated by Lord ELLENBOROUGH in *Connolly v. Vernon*, 5 East, 78, "a circumstance, *mistaken and false*, will not frustrate the grant of particulars sufficiently once ascertained. But here (in that case) the words first used are *general* words, not descriptive of particular things; and, according to Lord HARDWICKE, in *Gascoigne v. Barker*, 3 Atk. 9, 'where a man does not make a certain definitive description, it is very difficult for courts of justice not to construe subsequent restrictive words as explanatory of the former.' And this distinction is to be found in Dyer, 50, *b*," says Lord ELLENBOROUGH.

In the grant before us the general descriptive words employed would certainly be sufficient, in the absence of any restrictive clause, to pass all the debtor's property; but we must suppose that the grantor had a purpose in the more particular description which he thought proper to give in the schedule, and that that purpose was what he declares it to be, a more particular and full description of the property conveyed. To withhold this meaning from the words of reference to the schedule is to deny to them all import whatever; and that is justified by no rule of construction.

If, instead of referring to the schedule for a particular description of the property, the grantor had followed the general description with such words, as "namely," "that is to say," or "as follows," and set out in the body of the assignment itself the items enumerated in the schedule, there could hardly have been a doubt but that the preceding general words of description would have been restrained and confined to the subsequent enumeration. And if that be so, how does the fact that the schedule, instead of being incorporated in the body of the deed, is on a separate sheet of paper annexed thereto, change in any manner the application of the principle? For the schedule being part of the deed, we should read it as if inserted in the body of that instrument. And, having reference to the actual intent of the grantor, as a sum of money was among the things enumerated in the schedule, though not the money sued for, it would be difficult to conclude, especially if we consider the conduct of the party, that he had any design of passing to his assignee any other money than that mentioned.

In support of the construction which we place upon the instrument before us, in addition to the authorities cited, we deem it proper to refer briefly to a few of the many decided cases where schedules,

as in this case, have been referred to, and made to control the more general words of description in the granting clause of the deed.

In the case of *Wood v. Rowcliffe*, 5 Eng. Law & Eq. 471, a bill of sale purported to assign to G. R. "all the household goods and furniture of every kind and description whatsoever in the house No 2 Meadow place, more particularly mentioned and set forth in an inventory or schedule of even date, and given up to the said G. R. on the execution thereof." At the time of the execution of the bill of sale, one chair was delivered by the grantor to grantee in the name of the whole of such goods and furniture: but the schedule did not specify all the goods and furniture in the house; and the court of *exchequer* held, after full argument in support of a different construction, that the bill of sale only operated as an assignment of the goods and furniture specified in the schedule.

In the case of *Wilkes v. Ferris*, 5 Johns. 335, a debtor, by assignment for the benefit of creditors, assigned "all the goods, property, wares, merchandise, chattels, vessels, debts, sum and sums of money, claims and demands, and effects belonging to, and now due and owing to, the said H. C., or to which, and in which, he has any right, property, claim or demand, which said goods, wares and merchandises hereby granted and sold, are particularly described and enumerated in the schedule A, signed by the said H. C., and to these presents annexed." As the proper construction of that assignment, it was held that the general words in the deed did not include property not contained in the schedule, to which reference was made; "for, though the words in one place be general," said the court, "yet the assignment immediately goes on to specify, by reference to the schedule annexed, the specific articles of property assigned; and it therefore could operate only upon the articles specified; for, as the court said in *Munro v. Alaire*, 2 Caines, 327, if a general clause be followed by special words, which accord with the general clause, the deed shall be construed according to the special matter."

The case before us cannot, by any fair construction, be distinguished from the two cases just cited, of *Wood v. Rowcliffe* and *Wilkes v. Ferris*; and we think those cases were decided in accordance with settled rules of construction, from which it would be dangerous to depart. The principle applied in those cases is fully recognized and applied in the cases of *Moire v. Brown*, 14 Barb. 39 *Driscoll v. Fiske*, 21 Pick. 503, and in a number of other cases, many of which are referred to in Burrill on Assign. 266-268

Mims v. Armstrong.

The case most relied on by the appellant's counsel, as supporting a contrary construction, is that of *Platt v. Lott*, 17 N. Y. 478, where it was held that an assignment in trust, for the benefit of creditors, of all a debtor's property, which was therein stated to be "more fully and particularly enumerated and described in a schedule annexed," passed property not mentioned in the schedule. But, upon examination of that case, the grounds upon which the judgment proceeded do not appear to be consistent with previous decisions. It was conceded that the ordinary rule is as we have stated it; but, proceeding upon what was supposed to be the better evidence of the intent, the general and comprehensive words used in the grant, it was concluded that the office of the schedule, though made part of the deed, was only matter of convenience, and intended as a guide to the assignee, and, therefore, should not be allowed to qualify or limit the broader language previously used. This suggestion, with reference to the purpose of the schedule, has been, apparently, approved in some of the subsequent cases; but as such construction appears to us to be a manifest departure from an established rule of interpretation, we are not at liberty to adopt it.

It has been, however, insisted that, as the words of reference to the schedule are in parenthesis, they should not be allowed the restrictive force that they might otherwise have, as the sentence in which they occur would be complete without them. But whatever may be the office of a parenthesis, in a grammatical point of view, in a legal instrument, every word used is entitled to have its proper and ordinary meaning considered in the construction.

And, accordingly, in the case of *Gascoigne v. Barker*, 3 Atk. 9, before referred to, where it was contended that subsequent words used in a parenthesis might be rejected, Lord HARDWICKE, in delivering his judgment, said: "The first question is, whether the words in the parenthesis are to be taken as restrictive of the first words of the devise, and I can take them no otherwise." The words were certainly intended to have a meaning, and, if so, we must attribute to them their ordinary signification. The words here used were not the less restrictive because they were placed in parenthesis.

As we are of opinion that the plaintiff acquired no right to the money sued for, under the deed of assignment, the judgment of the court below, which was for the defendants, will be affirmed.

Judgment affirmed.

'WHEAT and others, appellants, v. CROSS.

(31 Md. 99.)

Contracts made by letter. Withdrawal of offer. Mistake of fact.

Where parties treat by correspondence through the post, an offer by one is complete as soon as the letter containing notice of acceptance is sent.

The party making the offer is bound, when the other party has accepted it before the notice of withdrawal reaches him.

A mutual mistake as to a fact wholly collateral and not affecting the essence of the contract will not invalidate such contract.

APPEAL from the court of common pleas upon a judgment in favor of the plaintiffs. The facts of the case are stated in the opinion.

BARTOL, C. J., delivered the opinion of the court.

This suit was brought by the appellee to recover the price of a horse sold to the appellants.

The plaintiff resided in Frostburg, and the defendants were engaged in the business of buying and selling horses in Baltimore. The contract of sale was made by correspondence between the parties through the mails.

The facts of the case, so far as it is material to state them, were as follows: On the 23d of August, 1867, the defendants received the horse into their possession, to be sold on commission, at that time apparently sound and in good condition. On the 12th of September, 1867, they addressed a letter to the plaintiff, stating that the horse had been sick, but is doing well at this time, and offering \$140 for him, clear of all expenses, and saying: "*You can draw on us at sight for \$140.*" This letter was received on the 15th or 16th of September; on the 16th, the plaintiff signified his acceptance of the offer by drawing on the defendants for \$140. The draft was sent on that day, and on the 17th, the defendants refusing to pay the draft, it was protested.

On the 16th of September, the defendants addressed a letter to the plaintiff, withdrawing their offer of the 12th, stating that "when they wrote they did not think the horse was so bad, but, since it had turned out to be '*farcy*,' they would not buy it at any price," and directing him "not draw on them for the money; that they will

not pay the draft until they see how the horse gets." This letter was not received by the plaintiff till after he had accepted the offer contained in the letter of the 12th, by sending the draft.

In the argument of the case, two positions have been taken by the defense.

1st. That there was not such mutual assent between the parties as to constitute a binding contract.

2d. That the offer by the defendants was made through mistake of a material fact as to the condition of the horse, and the nature of the disease under which it was suffering; and was withdrawn as soon as the mistake was discovered, and the acceptance thereof was not binding upon them.

1st. On the first question we consider the law well settled, that where parties are at a distance from each other, and treat by correspondence through the post, an offer made by one is a continuing offer until it is received, and its acceptance then completes the *aggregatio mentium* necessary to make a binding bargain. The bargain is complete as soon as the letter is sent containing notice of acceptance. This rule applies where the offer and acceptance are unconditional.

The offer may be withdrawn, and the withdrawal thereof is effectual so soon as the notice thereof reaches the other party; but if before that time the offer is accepted, the party making the offer is bound, and the withdrawal thereafter is too late.

In this case it appears the defendants' letter of withdrawal was sent on the same day on which the notice of the plaintiff's acceptance of their previous offer was transmitted, and it has been argued that the *onus* is on the plaintiff to show that the sending of the acceptance preceded the sending of the letter of withdrawal. This position is not correct; it is quite immaterial to inquire whether the defendants' letter of the 16th, or the draft of the same date, was first sent.

Until the notice of the withdrawal of the offer actually reached the plaintiff, the offer was continuing, and the acceptance thereof completed the contract.

This point was expressly decided in *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390. That was a case arising upon an insurance contract, but the reasoning of the court on this question, and the principles decided, are applicable alike to all contracts made by correspondence between parties at a distance from each other.

There the terms upon which the company was willing to insure were made known by letter, and it was held "that the contract was complete when the insured placed a letter in the post-office accepting the terms."

The court say, page 400, "we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended and is to be deemed a valid undertaking on the part of the company that they will be bound according to the terms tendered, if an answer is transmitted in due course of mail accepting them, *and that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed, before his letter of reply announcing the acceptance has been transmitted.*"

We refer to the able opinion of Mr. Justice NELSON in the case just cited, without attempting to repeat the reasoning upon which it rests.

The rule we have stated as governing the present case is supported by many adjudged cases, some of which are cited in the appellee's brief. Of these we refer to *Adams v. Lindsall*, 1 B. & Ald. 681; *Mactier's Adm'r's v. Frith*, 6 Wend. 103. See also *Dunlop v. Higgins*, 1 H. of L. Cases, 381.

2d. The second ground of defense which was chiefly relied on in the argument, that the defendants made the offer under a mistake of fact as to the actual condition of the horse, and were therefore not bound by it, is, in our judgment, altogether untenable. Such an error or mistake as that in no manner affects the validity of the contract. In a case where there is a mutual mistake of the parties as to the subject-matter of the contract, or the price or terms, going to show the want of a *consensus ad idem*, without which no contract can arise, such a defense may be made.

But here the mistake of the defendants was in relation to a fact wholly collateral, and not affecting the essence of the contract itself. The vendees cannot escape from the obligation of their contract because they have been mistaken or disappointed in the quality of the article purchased. In the absence of a warranty the principle of *caveat emptor* applies, and the buyer takes the risk of quality upon himself.

In support of so familiar a principle no authority need be cited

Judgment affirmed.

OBERNDORF, appellant, v. UNION BANK OF BALTIMORE.

(31 Md. 126.)

Principal and Surety. Release of Surety. Part payment is, principal.

While a creditor cannot release or compound with the principal debtor without discharging the surety, before a surety can be exonerated from his responsibility upon the ground that there has been an unauthorized indulgence given or composition made with the principal debtor, it must be shown that it has been effected by express agreement founded upon a valid consideration and legally binding on the creditor.

Part payment of the amount due will not discharge the surety, even where it is agreed that such part payment shall have that effect. Where a party is bound to pay a certain sum there is no consideration in contemplation of law for a promise that a less sum shall be received in satisfaction.

APPEAL from the superior court of Baltimore city.

In 1860 the firm of Stettheimer & Affelder assigned to the appellee certain collaterals to secure any liability then existing or to arise thereafter, with full power to the assignee to collect or compromise such collaterals if said firm made default, and apply the proceeds upon the firm's liability. In 1862 the firm failed, and in October of that year made a deed of trust of all their property to the appellant for the benefit of their creditors; at that time the appellee had on hand a portion of the said collaterals, among which was a note of Weiller Brothers & Co., which had matured January 11, 1862, and was in 1865 compromised by the appellee with them for fifty cents on the dollar.

A part of the liability of the first named firm to the appellees consisted of certain notes amounting to \$3,186.42, drawn by Steiner Brothers & Co., and discounted for said firm of S. & A. by the appellees. These notes were compromised with said Steiner Brothers in 1865, for fifty cents on the dollar. One other note, drawn by A. Heilbrun, and discounted for said firm, was also settled for fifty cents on the dollar.

The appellee had also discounted for Frick, Phillips & Co. a note of S. & A., to the payment of which it applied money realized from the collaterals. The appellee collected enough to pay the liabilities of the firm of S. & A. to it in full, and in 1866 delivered to the appellant the remainder of the collaterals which were not collected

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The opinion sufficiently shows the questions at issue.

Henry Stockbridge and Charles Marshall, for appellants.

L. Nevitt Steele, for appellee.

ALVEY, J., delivered the opinion of the court.

There is no doubt of the general proposition, that if the creditor release or compound with the principal debtor, without the consent of the surety, although the principal debtor may be in insolvent circumstances, and the arrangement with him be, in truth, to the surety's advantage, it will nevertheless discharge the latter from all responsibility. The question whether the surety has been, in point of fact, actually damnified by such dealing with the principal debtor is not open to inquiry. It is his right to determine for himself what is, or is not, for his benefit. He must be left free to consider whether he will have recourse to his remedy against his principal or not; and if, by any act of the creditor, this right be taken from him, the law allows him to elect to consider himself discharged from the contract altogether. "For it is," says Lord LOUGHBOROUGH, in the leading case of *Rees v. Berrington*, 2 Ves. Jr. 540, "the clearest and most evident equity not to carry out any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement."

But, while such is the rule, before a surety or indorser can be exonerated from his responsibility upon the ground that there has been an unauthorized indulgence given, or composition made with, the principal debtor, it must be shown that such indulgence or composition has been effected by some express agreement, founded upon a valid consideration, and which is legally binding on the creditor. Without sufficient consideration, the agreement would be a nullity, and consequently would bind no one. And the first question in this case is, whether the compromises and settlements made by the bank with *Steiner Brothers & Co.*, and with *Heilbrun*, whereby fifty cents in the dollar were received on the notes discounted for *Stettheimer & Affelder*, had in them the elements of binding contracts, and such as could be enforced by the parties

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either as a defense or as a cause of action; for if not, *Stetthaimer & Affelder* remained bound as indorsers, notwithstanding the arrangement made by the bank with the makers of the notes.

There is no principle better established than that part payment of the amount due, whether by principal or surety, will not discharge the surety, even where it is agreed that such part payment shall have that effect; for the surety being equally bound with the principal for the payment of the whole, neither can be discharged upon the payment of less than the whole, except it be by some agreement founded upon a valid and sufficient consideration. Where a party is bound to pay a certain sum, there is no consideration in contemplation of law for a promise that a less sum shall be received in satisfaction. *Geiser v. Kershner*, 4 Gill & Johns. 305; *Fitch v. Sutton*, 5 East, 230; *Wilkinson v. Byers*, 1 A. & E. 106; *Cotton v. Godwin*, 7 M. & Wels. 147; *Lincoln v. Bassett*, 23 Pick. 154.

In this case the notes, at the time when the compromises were made, were overdue, and it does not appear that there was any legal consideration whatever for the relinquishment, on the part of the bank, of the balance due on them, after the receipt of one-half their face value. There was no deed of composition with creditors, nor any release under seal given by the bank which would have imported consideration. And in the absence of some sufficient consideration, such an agreement as that proved on the part of the appellant, and set out in his prayers, made merely by parol, is wholly inoperative, and cannot be set up or relied on by the makers of the notes, either as against the bank or the indorsers. The notes have never in fact been surrendered to the makers, and the bank was not bound to any active diligence in their collection, in order to give it the benefit of the collaterals deposited with it by the indorsers.

This view of the case disposes of the first, second and third prayers of the appellant.

His fourth prayer we understand to be abandoned. It might well be so, because the note therein referred to was clearly within the terms of the contract of the 16th of May, 1860, and the bank was well warranted in applying the proceeds of the collateral securities to its payment.

As to the fifth and sixth prayers of the appellant, relating to the bank's holding and dealing with the collateral securities, after full payment of its claim on account of discounts, they were properly granted. For any loss or injury sustained by reason of misapplication

of the collaterals by the bank, or its failure to account after applying in good faith a sufficient amount of such collaterals to pay its claims against *Stettheimer & Affelder*, the appellant was certainly entitled to recover. And while these prayers secured to the appellant the full benefit of that inquiry before the jury, it is no objection to them, that can be taken by the appellant, that they were granted in connection with objectionable prayers offered by the appellant and modified by the court, and which opened a wider scope of inquiry for the appellant's benefit.

The court below is right in granting the appellee's first prayer, as being the converse of the appellant's fourth, which was not maintainable, as we have seen.

The appellee's second prayer, however, should have been refused, though, in the view we have of this case, the granting of it was by no means prejudicial to the appellant; but, on the contrary, was a concession to him of ground of recovery, which he was not entitled to occupy before the jury. The action of the court, therefore, in granting this prayer, is no cause for reversal.

And as to the third and fourth prayers of the appellee, we think it clear that the court was right in granting them both. The appellee had express authority to compromise with parties indebted on the collateral securities, and we have said that agreements, such as that stated in the fourth prayer, were inoperative for want of sufficient legal consideration.

Judgment affirmed.

SAYLOR, appellant, v. PLAINE *et al.*

(31 Md. 158.)

Wills — construction of. Trusts — extrinsic evidence.

The heir is always to be favored at law, and not to be excluded on mere conjecture. On the contrary, there must be satisfactory evidence of an intention to give a beneficiary interest to the devisee.

Where a trust results by operation of law, as, for instance, where there is a devise or bequest to a person "upon trust," and no trust is declared, etc., in such cases the trust results to the heirs at law or personal representatives, and extrinsic evidence will be rejected.

APPEAL from the circuit court of Frederick county, in equity.

The facts appear from the opinion.

Saylor v. Plaine.

Wm. P. Maulsby, for appellant.

Wm. J. Ross, for appellees.

ROBINSON, J., delivered the opinion of the court.

Jonathan Plaine died in the year 1835, having by will disposed of his property as follows :

"I give and bequeath unto my wife, Lydia Plaine, all my property, both real and personal, that now belongeth or in any wise appertaineth unto me, or that may or shall at any time hereafter belong unto me, to be *wholly hers* during her widowhood, out of which property she is to pay all of my legal debts, and, at the termination of her widowhood, I give and bequeath unto Martin Diehl, Jacob Saylor, Thomas Ogle and Abraham Wolfe, of Martin, all the property, both real and personal, that my wife shall possess at the termination of her widowhood, to dispose of according to his or their verbal directions, should her widowhood terminate in death ; but, should her widowhood terminate in marriage, I give and bequeath unto the said Diehl, Saylor, Ogle and Wolfe only three-fourths of the property, both real and personal, that shall be possessed by the said Lydia Plaine at the termination of her widowhood by marriage, and the said three-fourths to be disposed of according to the verbal directions of the said Diehl, Saylor, Ogle and Wolfe, or either of them ; and the remaining one-fourth I will and bequeath unto the said Plaine, to be *wholly hers*, to make use of as she may see or think proper."

Lydia Plaine, the widow, lived until 1866, and, after death, there was found among her papers, carefully put away, an instrument of writing, signed by the testator, Jonathan Plaine, without date, containing directions to the said Diehl, Saylor, Ogle and Wolfe as to the manner in which he desired them to dispose of the property upon the termination of the widowhood of his wife, either by marriage or death. On the back of this instrument was found the following indorsement :

"This paper, with the contents, is not to go to court, but to be kept at home in the hands of the executors, or Diehl, Saylor, Ogle or Wolfe."

The first question to be decided is whether Diehl, Saylor and others take a beneficial interest in the property under the will, or was it devised to them in trust ? We deem it unnecessary to review the many cases in which this question has arisen upon the con-

struction of wills. It is sufficient to say that no positive rule can be laid down which shall determine in all cases what terms or expressions will carry a beneficial interest, or what will create a trust. Courts, refusing to be governed by arbitrary rules or mere technical phraseology, will look to the whole will in order to ascertain the intention of the testator.

The words "*trust*," or "*trustees*," have, it is true, a defined and technical meaning, and are more generally as well as more properly used; but it is well settled that there is no magic in particular words, and any language which satisfactorily indicates an intention to stamp upon the devise the character of a trust will be sufficient.

If the intention be not plainly expressed, or if the language used be ambiguous, there are certain well-established rules which courts will invoke to aid them in the construction of the instrument.

The heir is always favored in law, and is not to be excluded on mere conjecture. On the contrary, there must be satisfactory evidence of an intention to give a *beneficial interest* to the devisee, and not merely negative evidence, that no benefit was intended to the heir. "For," says Lewin on Trusts, 181, "the trust results to him not so much on the ground of intention, but because the deviser has declared no intention."

In regard to the will before us, although it is inartificially drawn, and its provisions somewhat curious, yet, looking to its whole context, we think there can be but little doubt as to its proper construction.

In the first place the testator devises to his wife during her widowhood all the property, real and personal, with remainder over to Diehl, Saylor, Ogle and Wolfe, "*to dispose of according to his or their verbal directions.*"

In the event of her marriage, he gives to her one-fourth of the property, "*to be wholly hers to make use of as she may see or think proper,*" and the remaining three-fourths to the said Diehl and others, "*to be disposed of according to the verbal directions of the said donees, or either of them.*"

Now we cannot fail to observe the striking difference in the language used in the devise to the wife, and in the limitation over to Diehl and others. In the former he directs that the property shall be *wholly hers*, to make use of as she may see or think proper. The intention to give the wife a *beneficial interest* is plainly expressed, and the language used is clear and unambiguous. The property is

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to be "*wholly hers*" during the widowhood, and in the event of marriage one-fourth is to be "*wholly hers*, to make use of as she may see or think proper." But in the limitation over to Diehl, Saylor, Ogle and Wolfe, these significant words are entirely omitted. He does not say that the property shall be *wholly theirs* upon the termination of the intermediate estate, but devises it to them "*to be disposed of according to their verbal directions, or the directions of either of them.*"

If it were the purpose to limit the estate over to them in fee, why authorize them to dispose of it according to their verbal directions? Can we presume that the testator did not know that a devise of the fee necessarily carried with it the power of disposing of the property in any manner which the devisees might see proper?

Again: is it reasonable to presume that he intended to give to each a beneficial interest, and at the same time to authorize either one of them to dispose of the whole property without the consent or acquiescence of the other devisees equally interested?

Looking, therefore, to the face of this strange and curious will, and comparing its several provisions with each other, we think it may be fairly inferred that the testator did not design to give to these donees, who were neither his heirs or next of kin, but strangers in blood, a beneficial interest in the property, but that they should take it in trust.

If so, and the terms of the trust are not declared, or are too vague to be executed, the next question to determine is, whether the instrument of writing, found among the papers of the widow, and containing directions to the donees as to the disposition of the property, can be admitted as a declaration of the trust?

The law has wisely thrown around the execution of wills and testamentary papers certain solemnities, the observance of which is necessary to their validity. In the disposition of real estate it provides that they shall be signed by the testator, and attested by three or four credible witnesses.

Now, if this *unattested* paper, found *thirty years* after the death of the testator, is to be received as a declaration of trust; if it is to be engrafted on the will, and to give effect to the same; if, in fact, it is to control the disposition of the real estate of the testator, would it not be a palpable violation of the statute?

The law upon this subject is thus briefly stated by Lewin on Trusts, § 69: "Should the testator devise the estate in such language that

the will passes the legal estate only to the devisee, and manifests an intention of not conferring the equitable, in short, stamps *the devisee* with the character of trustee, and yet does not define the particular trusts upon which he is to hold. In this case, no paper not duly attested (except, of course, papers existing at the date of the will, and incorporated by reference) will be admissible to prove what were the trusts intended. Nor will the devisee be allowed to retain the beneficial interest himself; but, while the legal estate passes to him, the equitable will result to the testator's heirs at law."

In *Briggs v. Penny*, 3 De Gex & Smale, 525, the testatrix bequeathed to Sarah Penny all the rest and residue of her personal estate, "well knowing that she will make a good use and dispose of it in a manner in accordance with my wishes."

After the death of the testatrix, four papers were found in her writing-desk, all in her handwriting, and without date. These papers contained directions to the said Sarah Penny as to the manner in which the testatrix desired her to dispose of the property bequeathed in her will.

Two questions arose in the case. First, did Sarah Penny take a beneficial interest under the will, or was it a bequest in trust? Secondly, if a trust, could the four unattested papers be admitted for the purpose of ascertaining the terms of the trust?

The vice-chancellor held that the bequest was in trust, but refused to admit either of the four papers for the purpose of ascertaining or declaring the terms of the trust. He denied that they had any force or efficacy as an agreement, a gift, or a declaration of trust, or in any other manner.

The same question was also decided in *Adlington v. Cann*, 3 Atk. 141.

An exception to this general rule, which excludes informal papers and parol evidence, has been recognized in cases where the testator devises or bequeaths property to a party, under an agreement or understanding that he would hold it in trust for another. In such cases, courts will not permit the devisee to rely upon the statute for the purpose of perpetrating a fraud. It was upon this principle that *Podmore v. Gunning*, 10 Eng. Ch. 247, and other cases of that class were decided.

Another exception has been admitted, where the law raises a trust by presumption. Before the statute 1 William IV, ch. 40, the executor was entitled to the undisposed of residuary estate, but it

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was held that, whenever there was a bequest to the executor, the law raised a presumption that he was to hold the residue of the estate for the next of kin or parties entitled. In such cases, it has been held that parol evidence is admissible for the purpose of rebutting the trust, but it has scarcely ever been received without eliciting some expression of disapprobation. There is certainly no disposition on the part of the courts to extend the exception.

Where, however, the trust results by operation of law, as, for instance, where there is a devise or bequest to a person "upon trust," and no trust is declared, or upon certain trusts that are too vague to be executed, or upon trusts to be thereafter declared, and no declaration is made, or upon trusts that are unlawful, in such cases, a trust results to the heirs at law or personal representatives, and extrinsic evidence will not be received. *Lewin on Trusts*, 183; *Langham v. Sandford*, 17 Ves. 442; *Walton v. Walton*, 14 id. 322; *Rackfield v. Coreless*, 2 P. Wms. 158.

The property in this case being devised and bequeathed to the donees upon trust, the terms of which are not declared in the will, it must follow that a trust arises by operation of law in favor of the heirs of the testator in regard to the real estate, and, as to the personal property, in favor of the personal representatives.

The decree of the court below will, therefore, be affirmed in part, and reversed in part, and the cause remanded, in order that a decree may be passed, in conformity with the opinion of this court.

Decree affirmed in part, and reversed in part, and the cause remanded.

BRANSON, appellant, v. HILL, adm'r, *et al.*

(21 Md. 181.)

Wills, construction of. Words of survivorship.

Where a gift is to take effect in possession immediately upon the death of the testator, words of survivorship refer to that time.

Where the gift is not immediate, there being a prior life carried out, but words of perpetuity qualify those of survivorship, the survivor will not take the whole gift to the exclusion of the heirs or representatives of his co-legates.

APPEAL from the circuit court of Baltimore county.

The facts appear from the opinion.

L. L. Conrad and *Bernard Carter*, for appellant.

Wm. B. Hill and *Wm. Danish*, for appellees.

ROBINSON, J., delivered the opinion of the court.

The question to be decided in this case arises upon the construction of the following clauses in the will of the late Mary Smith.

"Item. I give and bequeath unto my beloved sister, Margaret Branson, for and during her natural life, the rents, issues and profits of my whole estate, real, personal and mixed, consisting of several houses, lots and personal effects; and it is my will and desire, that, after the death of my said sister, I give and bequeath to Charles Emmory Branson and Mary E. Branson, children of my nephew, Joseph Branson, or the survivors of them, the one moiety, or half part, of my whole estate to them and their heirs forever.

"Item. And it is my will, that, after the death of my sister aforesaid, I give and bequeath the other moiety, or half part, of my estate to David Allen Mantz and William Henry Mantz, children of my niece, Sophia Mantz, or the survivors of them, their heirs and assigns, forever.

"Item. It is further my will and desire, that, if all the above-named legatees should die before they arrive at age, and without lawful issue, then, and in that case, I give and bequeath the property aforesaid to the surviving children of my nephew, Joseph Branson, and my niece, Sophia Mantz, to them and their heirs forever, share and share alike

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"And I do further order and direct, after the death of my said sister, that the rents, issues and profits of my estate be deposited in the savings institution at interest, and there remain until the youngest of the first-named legatees should arrive at full age, when a dividend will be made, and the property given up to them."

The testatrix died in 1843, leaving Margaret Branson, the life tenant, and the parties in remainder living at the time of her death.

Charles E. Branson, the first-named legatee in remainder, died in 1855, and before the termination of the life estate of Margaret Branson, leaving a widow and child, and his sister, Mary E. Branson, the co-legatee in remainder, surviving him.

What estate did Charles E. Branson take under this will? is the sole question presented by this appeal. Did it *vest in interest* upon the death of the testatrix, and, being personal estate, pass as such to his personal representatives; or was it *contingent* upon his surviving the life tenant, Margaret Branson?

If the former, the decree must be affirmed; if the latter, having died before the termination of the life estate, his sister, Mary E. Branson, the surviving co-legatee in remainder, would take the entire moiety, to the exclusion of the appellees.

While it is insisted, on the one hand, that the words "*or the survivor of them*" refer to the termination of the life estate, and that the legatees only who may be living at that time can take, it is urged with equal confidence, on the other, that they refer to the *death of the testatrix*, and that the provisions and language of the will plainly indicate that it was the intention they should take *in interest at that time*.

Few questions in regard to the construction of wills have given rise to greater difficulty than the proper meaning of the words of survivorship, as used in the will before us, and the decisions are conflicting and irreconcilable with each other.

Where the gift is to take effect in possession immediately upon the death of the testator, it is plain the words of survivorship must refer to that time, there being no other period in the devise to which they could relate.

But where the gift is not immediate (*i. e., in possession*), there being a prior life, or other particular interest carried out, so that there is another period to which the words could refer, the question becomes one of greater difficulty. 2 Jarman on Wills.

An examination of the earlier English cases will show that the
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courts uniformly held that words of survivorship in wills of both real and personal estate referred to the death of the testator. Some of the cases went upon the particular phraseology and context of the will; others upon the probable intention of the testator, making allowances for the deficiency and inaccuracy of expression so commonly to be found in testamentary instruments, and the policy of the law which favors the vesting of estates; and others, again, upon the presumption that the testator did not intend to cut off from the provisions of his will the children and descendants of such of the primary legatees or devisees as might happen to die before the termination of the intermediate estate. 1 Eq. Ca. Ab. 293; *Rose v. Hill*, 3 Burr. 1881; 3 B. C. P. 195; *Goodtitle v. Whitby*, 1 Burr. 228; *Marryat v. Townly*, 1 Ves. 102; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Perry v. Woods*, 3 Ves. 204; *Brown v. Bigg*, 7 id. 279; *Doe ex dem. v. Prig*, 8 B. & C. 231; *Maberly v. Strode*, 3 Ves. 450.

But, strong as may be the array of authorities in favor of this construction, and extending, as they do, for a period of more than two hundred years, it must be admitted that, in the latter English decisions, especially where there is a gift of personal estate to a person for life, and after the termination of such interest to certain persons *nominatim*, or to a class, there is a strong inclination to refer the words of survivorship to the period of distribution, or to the termination of the intermediate estate. That is to say, the legatees surviving at that time take to the exclusion of the personal representatives of such as may have died before that period and to this modern rule of construction such eminent elementary writers as Mr. Jarman and Mr. Redfield give their unqualified approval. *Brograve v. Winder*, 2 Ves. Jr. 634; *Newton v. Ayscough*, 19 Ves. 534; *Cripps v. Wolcott*, 4 Mad. 11; *Neathway v. Reed*, 17 E. C. L. and Eq. 151; *Pope v. Whitcomb*, 3 Russ. 124; *Goddard v. Lothbridge*, 16 Beav. 529; *Twining v. Twining*, 15 Sim. 139, 510; and *Smith v. Osborne, and others*, 6 House of Lords' Cases, 393.

In this country, however, the weight of authority seems to be in favor of the earlier rule, which refers the words of survivorship to the death of the testator, and this, too, without recognizing any distinction between real and personal estate. *Moore v. Lyons*, 25 Wend. 119; *Ross v. Drake*, 37 Penn. 373; *Hansford v. Elliott*, 9 Leigh, 79; *Blanchard v. Blanchard*, 1 Allen, 223.

So far, however, as regards the construction of the will before us, it is unnecessary to decide which of these two rules is the better

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sustained by authority and reason, because all the cases concur in saying that the intention must be carried out if it can be fairly ascertained from the language and provisions of the will.

It is, then, to the instrument itself to which we must at last resort, in order to ascertain its true meaning; and if this can be done, reference to rules often arbitrary, and decisions sometimes irreconcilable, will be altogether unnecessary.

With this universally acknowledged principle as our guide there can be but little difficulty in the construction of the will before us.

In the first clause the testatrix bequeaths to Margaret Branson, her sister, for life, the *usufruct* of the estate, and after her death to Charles E. and Mary E. Branson, children of her nephew, Joseph Branson, "*or the survivors of them,*" the one moiety or half part of her whole estate, "*to them and their heirs forever.*"

Now, with these words of perpetuity qualifying the terms "*or survivor of them,*" can it be said that she intended in the event of one of the primary legatees dying before the termination of the life estate, but leaving children, that the surviving legatee should take the entire moiety of the estate? The bequest is not to Charles E. and Mary E. or the survivors and his heirs, but to "*them and their heirs forever.*"

In *Moore v. Lyons*, 25 Wend. 119, the devise was of real estate to one for life, and after her death to her three daughters, Susan, Jane and Betsy, or "*to the survivors or survivor of them, their or her heirs and assigns forever.*" Almost the identical words used in this will, and, although the court approved of the rule which referred the survivorship to the death of the testator, yet it was held that, apart from any arbitrary rule of construction, the terms of the will plainly indicated that the testator intended that the children of either of the three daughters who might die during the continuance of the intermediate estate should take an equal share with the surviving sisters.

And in *Hansford v. Elliott*, 9 Leigh, 79, where there was a bequest of personal property to the wife for life, and "at her death, for the whole personal estate to be divided equally among my surviving children, by name," Judge PARKER, in delivering the opinion of the court, said: "The bequest is to children specifically named; I cannot believe the testator meant to make a *tontine* among them, and if all but one died before the mother, for that one to take all in exclusion of grandchildren or their descendants."

If, however, it be conceded that the language and provisions in the

first clause of the will do not plainly indicate that the testatrix designed the legatees should take an interest transmissible to their heirs or personal representatives, irrespective of their surviving the life tenant, we think all doubt is removed when it is read in connection with the third clause, in which the entire estate is limited over, upon the dying of all of the above-named legatees "before they arrive at age and without issue."

Now suppose all of them had died leaving children, before the termination of the life estate of Margaret Branson, if the construction insisted upon by the appellant be correct it would follow that the children could not take, because the estate had never vested in their parents, nor could those entitled in remainder, upon the legatees dying without issue, because the contingency never happened.

We should thus have a case of *intestacy*, where it is plain no *intestacy* was ever intended, and the third clause in the will, with its limitation over, would likewise be entirely defeated. Could a construction be more repugnant to the intention of the testator, which speaks to us from the four corners of this will?

We are of opinion, therefore, that Charles E. Branson took an estate in interest upon the death of the testatrix, and, being personal property, it passed upon his death to his personal representatives.

This construction gratifies the intention of the testator, and gives effect to each and every provision of the will.

It accords with the settled rule of construction in favor of the *early vesting* of legacies, and is consistent with the policy of the law which opposes *joint tenancy*, with its distinctive features of *jus accrescendi*, or right of survivorship.

Taking this view of the case upon its merits, we have deemed it unnecessary to express any opinion as to whether the question presented in this appeal was concluded by the decree of February 7th, 1867, and we are not to be understood as overruling, or as questioning in any respect, the correctness of the decision in *Vickers and wife v. Tracey*, 22 Md. 196.

For these reasons, the decree will be affirmed.

Decree affirmed.

APRIL TERM, 1869.

Maryland Fire Insurance Co. v. Whiteford.

MARYLAND FIRE INSURANCE Co., appellant, v. WHITEFORD *et al.*

(21 Md. 219.)

Insurance. Hazardous articles.

An insurance policy, containing clauses which forbid the keeping by the insured upon his premises of "hazardous" articles, but which has indorsed upon it by the company permission "to keep one barrel of benzine or turpentine in tin cans," is not violated by the introduction of a barrel of benzine in a wooden barrel upon the premises for the purpose of immediately emptying the same into a tin can.

APPEAL from the superior court of Baltimore city.

Action on a policy of insurance. The facts are sufficiently stated in the opinion.

Wm. A. Fisher and *I. Nevitt Steele*, for appellant.

S. Teakle Wallace and *Wm. Schley*, for appellees.

STEWART, J., delivered the opinion of the court.

The party insured in this case, according to the terms of their policy, were not to keep in the buildings occupied by them any articles, goods or merchandise denominated hazardous, or extra or specially hazardous, in the conditions of insurance annexed to the policy, except as provided in the policy, or thereafter agreed to by the insurers in writing upon the policy.

The original contract between the parties was modified by the indorsement upon the policy of the 24th November, 1865, specially referring to the article described as "benzine."

This indorsement is in the following language: "Permission given to keep one barrel of benzine or turpentine in tin cans, and one-half barrel of varnish, for use in No. 9 Commerce street."

As we comprehend the import of this indorsement, the quantity mentioned of benzine was authorized to be used on the premises, and unquestionably the insured had the permission to keep one barrel of benzine in tin cans upon the property, without incurring risk of forfeiture of any of their rights under the policy of insurance.

A fair and reasonable construction must be given to the indorsement, so far as the intention of the parties can be deduced from the terms employed.

Policies of insurance, like other contracts, should have such practical and ordinary interpretation as to carry into effect the obvious understanding of the parties concerned in them. This indorsement is not a *warranty*, but a *permission* given by the insurers, and to be *substantially* complied with on the part of the insured, to enable them to claim the benefit of the privilege.

Judging of this indorsement by the rules of ordinary construction, we think there can be no doubt of the real meaning and purpose of the parties to allow the quantity of one barrel of benzine to be kept for use on the premises, but for better security against fire, from the dangerous character of the article, the benzine was required to be kept, not in the wooden barrel, but in a suitable metallic vessel, either in tin cans or in one tin can, equally safe and proper, and better calculated than the wooden vessel to prevent accident from its use. It was proven at the trial that benzine is the product from the distillation of coal oil or petroleum, the most volatile of which is called gasoline; that benzine is inflammable and explosive when in contact with the atmosphere, and vaporizes from agitation.

According to the testimony of those familiar with its character and properties, the keeping of benzine in one tin can large enough to hold the quantity of a barrel, or less amount, is quite as safe, if not more so, than to keep it in tin cans.

There was, therefore, a *substantial* compliance with the provisions of the indorsement in keeping the quantity specified in one tin can.

If there could be any rational doubt of this being the purport of the language, apposite analogy will fortify the construction we put upon the indorsement.

A representation is substantially complied with by the adoption of precautions which, if not those exactly stated in the application, may be such as tend to accomplish the same purpose, and considered equally efficacious; for example, when it is stated that ashes are taken up in *iron* hods, it would be a substantial compliance if *brass* or *copper* were substituted.

So when it is represented that casks of water, with buckets, are kept in each story, if a reservoir be placed above with pipes to convey water to each story, and found by skillful and experienced persons to be equally efficacious, it would be a substantial compliance. Angell on Ins. 195; referring to *Houghton v. Manufacturers' Ins. Co.*, 8 Metc. (Mass.) 122.

Under the permission to keep the benzine for use, to the extent

Maryland Fire Insurance Co. v. Whiteford.

specified, the insured were not restricted in their right to procure it in any usual way; and the purchase or procuring of a barrel of it from merchants or other persons having it, and its introduction and transfer from the wooden barrel to the tin can, were allowed to the insured by every fair intendment.

If it had been the intention of the parties to make the permission more restrictive, proper terms to that effect should have been employed.

We perceive no valid objection to the prayer of the appellee, insisting that the insurers were not exempted from their liability for the loss in this instance because of the introduction of benzine in the wooden barrel, its transfer, and the keeping of it on the premises of the insured, as described in the prayer.

Certainly, its temporary introduction into the barrel was not the *keeping of it* in the wooden barrel, and cannot, in any just sense, be considered violative of the terms of the indorsement.

The concluding portion of the appellees' prayer is also unobjectionable, as the fire may have been attributable to the want of ordinary care, or the fault and negligence of the appellees, or their employees or agents, yet, in the absence of fraud or design, their right of recovery was not barred thereby.

Fires frequently occur from some negligence of the party assured, or his agents, and the underwriters insure against this unless they choose to stipulate otherwise, which has not been done in this case.

A loss by fire occasioned by the fault and negligence of the insured or his servants, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss, and also upon the ground that the express exceptions in policies against fire leave this within the scope of the general terms of such policies. *Columbia Ins. Co. v. Lawrence*, 10 Peters, 578; *Johnson v. Berkshire Mutual Fire Ins. Co.*, 4 Ala. 388.

There is no exception in the policy here to exempt the appellants from their obligation to indemnify the insured on account of such negligence.

But, on the contrary, the appellants promise to make good all loss or damage, within the limits of insurance, as shall happen by fire, except any loss by fire "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power."

These express exceptions necessarily exclude others to be implied, extending to negligence or fault on the part of the insured; where

there is a fraud or design, and not mere carelessness, occasioning the fire, other considerations may fortify exemption and exonerate the company insuring.

No allegation of fraud is made or proved in this instance.

The prayers of the insurers could not be properly granted by the court, insisting, as they did by the first, that the habit of the insured, as they needed benzine, of bringing it upon the premises in a wooden barrel, and then transferring it to the can, as described in the prayer, did amount to keeping it on the premises in a wooden barrel, and constituted a breach of the permission, construing it as a warranty; and, by the second prayer, upon the similar theory of a warranty, that because the appellee, the insured, usually kept benzine in a quantity, not exceeding one barrel, in one large tin can, and at the time of the fire were having the can filled from a barrel of benzine on the premises, they violated or committed a breach of the indorsement.

The mere fact of the barrel of benzine being on the premises for the purposes described could not, upon any fair construction of the terms of the contract, amount to keeping benzine in a wooden barrel upon the premises.

Nor could its being kept to the amount of a barrel, in one tin can, be reckoned other than a substantial compliance with the indorsement upon the policy, and such as the parties, it may be presumed, would have expressly agreed to at the time of the indorsement, if required.

Under the terms of the original policy, the keeping of any of the prohibited articles, or the storing thereof, on the insured premises, only operated to make void the policy, *so long as they were so used*, but the policy was not absolutely forfeited by the storing or keeping of the forbidden article.

What may have been the *habits* of the insured in regard to the *keeping* of the benzine, could, neither under the terms of the original policy or the indorsement, have any application, unless, *at the time of the occurrence of the fire*, the barrel of benzine was actually *stored* or *kept* upon the premises in the *wooden barrel*.

The hypothesis of facts assumed in the prayers of the insurers, as well as their theory of construction of the contract between the parties, was liable to objection, and the court below very correctly refused to grant them.

Judgment affirmed.

RICHARDS, executor, etc., appellant, v. JACKSON.

(21 Md. 250.)

Real Estate Broker's Commissions.

A broker employed to sell real estate must produce a person who ultimately becomes a purchaser before he is entitled to his commissions, unless his failure to do so is occasioned by the fault of the vendor.

APPEAL from the court of common pleas.

Action against appellant's testator, one Byrd, to recover for services of appellee as real estate broker. Byrd employed appellee to obtain a purchaser for certain real estate. He introduced one Johnson who was willing to purchase and enter into a written contract so to do. Johnson subsequently refused to complete the contract, because he was advised by his counsel that the title was not good, and for no other reason. The superior court of Baltimore, afterward, in an action concerning the same property, decided that the title offered Byrd was a clear one in fee simple.

F. H. Winston, Jr., and Wm. Shepard Bryan, for appellant.

Spotswood Garland and Albert Ritchie, for appellee.

BRENT, J., delivered the opinion of the court.

We have very carefully considered the argument of the counsel for the appellee, in which he urges, with great zeal and ingenuity, that the case of *Kimberly v. Henderson & Lupton*, 29 Md. 512, should be overruled. He has failed to convince us that there is any error in that decision. It is fully sustained by the authorities cited in the opinion, and, we think, correctly states the law.

It is there held that a broker, employed to sell real estate, must produce a person who ultimately becomes a purchaser, before he is entitled to his commissions. It is not sufficient that he should enter into an agreement to purchase, but he must actually purchase, by complying with the terms agreed upon, unless his failure to do so is occasioned by the fault of the vendor.

In this case, as in *Kimberly v. Henderson & Lupton*, the person introduced by the broker entered into an agreement to purchase, but he afterward failed to consummate it.

There can be no doubt that the title of the vendor was a valid one, and there is, therefore, no force in the position taken by the appellee that the failure to consummate the purchase was occasioned through the fault of the vendor, who did not sell a good title.

As, therefore, the appellee failed in introducing by Byrd, a person who ultimately became the purchaser of the premises which he had employed him to sell, there was error in the instruction of the court below, and the judgment must be reversed. The reversal will be without procedendo, as the record discloses a case in which the appellee, who was plaintiff below, is not entitled to recover.

Judgment reversed.

WARD, appellant, v. THE STATE.

(31 Md. 279.)

Constitutional law. Traffic between the states. State taxes. Rights of citizens of other states.

By an act passed in 1868, it was provided that no person not being a permanent resident of this state shall sell, etc., within the limits of Baltimore, any goods, etc., other than agricultural products and articles manufactured in the state of Maryland, etc., either by card, sample or list, without first obtaining a license so to do. The rate of license is \$300.

Held, that such license is a tax upon a particular branch of business carried on in a particular mode within the limits of the state by a particular class of persons, and not a tax upon goods or merchandise imported into the state either from foreign countries or from other states.

That such a tax is not repugnant to that clause of the eighth section of article one of the United States constitution, which grants congress the power to regulate commerce among the several states.

That such tax is not repugnant to the clause of the second section of article four of the United States constitution, which declares that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.

APPEAL from the criminal court of Baltimore county.

The facts appear from the opinion.

George C. Mound and A. Stirling, Jr., for the appellant:

The law under consideration requires the non-resident to pay for his license to sell goods by sample, etc., the sum of three hundred

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dollars, which is twice as large a sum as it exacts from the resident engaged — whether selling by sample or otherwise — in the most extensive mercantile transactions. Code of Pub. Gen. Laws, art. 53, § 55.

The power to exact from the non-resident more money for a license to sell goods than from the resident involves the power to prohibit the non-resident from selling altogether. *Brown et al. v. State of Maryland*, 12 Wheat. 439; *McCulloch v. State of Maryland*, 4 id. 316; *Norris v. The City of Boston*, 7 How. 283; *Gibbons v. Ogden*, 9 Wheat. 196; *Groves v. Slaughter*, 15 Pet. 511; *Holmes v. Jennison*, 14 id. 570; *State of Louisiana v. S. H. Kennedy & Co.*, 19 La. 397; and particularly the opinion of McLEAN, J., in *Smith v. Turner*, 7 How. 283.

Commerce among the several states is *traffic* among the several states; it may mean more than traffic, but it, at the least, means so much. *Gibbons v. Ogden*, 9 Wheat. 189. Congress has regulated traffic between the citizens of the different states. "It has been well remarked, that the regulation of commerce consists as much in negative as in positive action." McLEAN, J., in *Smith v. Turner*.

The question of difficulty is not whether the state may, as in this case, charge more to the non-resident than the resident for a license to sell and introduce into this state goods located in another state, but whether she can require for such a purpose, or from any one, a license at all. It may, with considerable confidence, be asserted that she cannot. *Brown et al. v. State of Maryland*, 12 Wheat. 419; *State of Louisiana v. S. H. Kennedy & Co.*, 19 La. 397; *Commonwealth of Pennsylvania v. The Philadelphia and Reading R. R. Co.*, reported in Baltimore Daily Law Transcript May 12th, 1869.

The law in question violates the second section of the fourth article of the constitution of the United States, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Cooley's Const. Lim. 16, 397, and the authorities cited in the margin; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Campbell v. Morris*, 3 H. & McH. 554; *Crandall v. State*, 10 Conn. 343, 344.

Isaac D. Jones (attorney-general), for the appellee:

Commerce "among the several states" does not comprehend any commerce which is purely internal between man and man in a single state, or between different parts of the same state, and not extending to or affecting other states. Commerce among the states means commerce which concerns more states than one. It is not an apt phrase

to indicate the mere *interior traffic of a single state*. The completely internal commerce of a state may be properly considered as reserved to the state itself. 2 Story on the Const. § 1061; *Gibbons v. Ogden*, 9 Wheat. 194; *Brown v. Maryland*, 12 id. 445, 447; 1 Kent's Com. 436, 437.

Again, the power to regulate commerce is not at all like that to lay taxes. The latter may well be concurrent, while the former is exclusive. The power of congress in laying taxes is not necessarily or naturally inconsistent with that of the states. Each may lay a tax on the same property without interfering with the action of the other. 2 Story on the Const. § 1064; *Gibbons v. Ogden*, 9 Wheat. 1.

The constitution of the United States treats the power to lay taxes and the power to regulate commerce as distinct and independent powers. 2 Story on the Const. § 1065.

It is further contended by the appellant that the law in question violates the provision of the constitution of the United States which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The claim of the appellant, as set up in this case, is to come into this state and enjoy *more* privileges and immunities than are accorded to citizens of the state. The meaning of this provision is, that the citizens of one state were not to be deemed aliens in another state, nor entitled to take or hold real estate or other privileges except as other aliens. The intention was to confer a general citizenship, and to communicate all the privileges and immunities which citizens of the same state would be entitled to under the like circumstances. 3 Story on the Const. § 1800.

"It means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real and personal property, and that such property shall be protected and secured by the laws of the state in the same manner as the property of the citizens of the state is protected." *Campbell v. Morris*, 3 H. & McH. 554.

The state has the exclusive right to restrict the right of suffrage and holding office to the citizens of the state who have resided therein for the time prescribed. It has the same right to restrict her merely interior traffic, and to prescribe the terms upon which non-resident traders shall be allowed to engage in that business.

MILLER, J., delivered the opinion of the court.

The appellant was indicted for that, not being a permanent res

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dent of this state, he did, on the 4th of December, 1868, sell, by sample, within the limits of Baltimore city, certain goods, wares and merchandise, described in the indictment, other than agricultural products and articles manufactured in the state of Maryland, without first obtaining a license so to do, contrary to the provisions of the act of 1868, ch. 413. It was admitted that the appellant, being at the time a citizen of the United States, and a citizen of and residing in the state of New Jersey, did commit the act and deed charged in the indictment, by selling by sample twelve bridle fronts and six leather blinkers for horse harness, without a license, and thereby violated this act of the general assembly of Maryland. The case was submitted for the purpose of obtaining the opinion and judgment of the court upon the question, whether this act is constitutional and valid. The court below adjudged the party guilty, and imposed the fine prescribed in the law, and from this judgment this appeal was taken, and has been argued on notes by counsel for the appellant, and by the attorney-general for the state.

The law enacts that "no person, not being a permanent resident of this state, shall sell, or offer for sale, or expose for sale, within the limits of the city of Baltimore, any goods, wares or merchandise, other than agricultural products and articles manufactured in the state of Maryland, within the limits of said city, either by card, sample or other specimen, or by written or printed trade list or catalogue, whether such person be the maker or manufacturer thereof or not, without first obtaining a license so to do." The rate of license is fixed at three hundred dollars, to run one year from date, and the penalty for so selling without license is, for each offense, not less than four hundred nor more than six hundred dollars. The same provision, so far as applicable to a case like this, is contained in the Code, art. 56, §§ 37, etc., and has been the law of the state since 1852, a period of seventeen years. No question has hitherto been raised as to the power of the legislature to enact such a law. It is now assailed upon the ground of repugnancy to two provisions of the constitution of the United States.

1st. To that clause of the eighth section of the first article which grants to congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

2d. To that clause of the second section of the fourth article which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

Before examining the decisions of the supreme court, which, upon such questions, are binding and authoritative expositions of the constitution, and to which the courts of all the states should yield respectful obedience, it is proper to ascertain what the law before us is, and what it seeks to accomplish. It is not a law which, upon its face, purports to levy a tax by way of license to sell, upon either foreign or domestic imports, while remaining in the hands of the importer in original packages. The indictment does not charge, nor does the record show, that the goods sold by the appellant were goods of this description. Nor does the law purport to be a tax upon the transit of goods through the state for traffic or commercial purposes. But it is a tax upon a particular business or trade carried on entirely within the limits of the state. Maryland, in common with other states, has subjected to taxation, by way of license, and as a source of revenue, every kind of business or trading carried on within her limits. With respect to her own citizens, her laws provide that no person or corporation within this state, other than the grower, maker or manufacturer, shall barter or sell any goods, wares, or merchandise, without first obtaining a license in the mode prescribed, and these licenses are graded according to the amount of merchandise or stock on hand, held by each person at the principal season of sale. There is nothing in this, or any other law of the state, which prohibits or restrains non-resident merchants, manufacturers or traders, or their agents, from bringing their goods here, and selling them in the same mode and under the same license as residents of the state. A custom, however, has grown up in recent times with merchants and manufacturers, in the large manufacturing and commercial cities and states, of traveling or sending agents or runners through other states and cities, with samples, cards, catalogues, or trade lists of their goods, and thereby selling, by retail or wholesale, large quantities of merchandise located beyond the limits of the states where they thus sell, and not subject to the local, state, county or municipal taxation, as are like goods in the hands of resident merchants or traders, to the great detriment of the business and trade of the latter. Large sales are thus made, and an extensive and lucrative business is thus carried on, and it is the object of the law in question to search and subject to taxation, by means of a license, the trade and business thus transacted within the limits of the principal city of this state. It is, therefore, a tax upon a particular business or trade, carried on in a particular mode within the limits

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of the state, by a particular class of persons, and not a tax upon goods or merchandise imported into the state, either from foreign countries or from other states, and the question is as to the power of the state to impose such a tax.

1. In reference to the first clause of the constitution of the United States, above quoted, all the decisions of the supreme court agree that it confers upon congress no power of regulation or direct control over the internal commerce or domestic trade of the states. *License Tax Cases*, 5 Wall. 470. As said by Mr. Justice McLEAN, in delivering the opinion of the court in the case of *Nathan v. Louisiana*, 8 How. 80, 82, "The right of a state to tax its own citizens for the prosecution of any particular business or profession within the state has not been doubted; and we find that in every state money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property not exempted by law, are taxed. The taxing power of a state is one of its attributes of sovereignty; and, where there has been no compact with the federal government, or cession of jurisdiction for the purposes specified in the constitution, this power reaches all the property and business within the state, which are not properly denominated the means of the general government; and as laid down by this court, it may be exercised at the discretion of the state." Such is the emphatic language of the supreme court on this subject. Nor is it, we apprehend, less within the power of a state to tax, in the shape of a license, any trade, business or occupation, when carried on in its borders by those who are not permanent residents of the state, whether foreigners or citizens of other states. Most of the states have exercised such power in the enactment of laws requiring licenses from hawkers and peddlers, in the imposition of a tax, either direct or by way of license, upon the agents of foreign insurance companies, and other corporations doing business within their limits, and by laws similar in character to the one now under consideration. In *Brown v. Maryland*, 12 Wheat. 419, a law of this state, which required all importers of foreign articles to take out a license to sell their importations in the original bale or package, was held to be invalid, because repugnant to the prohibition upon the states to lay imposts or duties on imports or exports without the consent of congress. The same law was also declared to be in violation of the clause giving to congress the power to regulate commerce with

foreign nations, and among the several states, but the court said that though the importer could not be required to have a license for selling a package of dry goods in the form in which it was imported, yet this state of things is changed if he sells them or otherwise mixes them with the general property of the state, by breaking up his packages, or traveling with them as an itinerant peddler. This decision, as explained by C. J. TANEY, in the *License Cases*, 5 How. 575, draws the line between foreign commerce, which is subject to the regulation of congress, and the internal or domestic commerce of a state, over which congress can exercise no control, and which belongs to the states; and the same view appears to have been taken by C. J. CHASE, in *Pervear v. Commonwealth*, 5 Wall. 475. It would be a strained construction of the power to regulate commerce "among the several states," to hold that it confers upon congress the power to authorize the citizens of one state to travel through another and sell their goods, either carried with them or by sample, without license, while the citizens of the state where they thus travel and trade can be rightfully subjected to a state tax on their goods, and a state license to sell them. But, whether the clause in question confers such powers or not, it is sufficient that it has never been exercised by congress, and, therefore, state laws and state regulations on the subject are valid; for the mere grant of such power to congress, so far as it relates to a case like the present, is not of itself a prohibition to the states, so as to render all state laws on the subject null and void. This point, notwithstanding the difference of opinion thereon at one time existing among the judges of the supreme court, and most conspicuously manifested in the *Passenger Cases*, 7 How. 283, was settled by the decisions in *Cooley v. The Board of Wardens, etc.*, 12 How. 299, and in *Crandall v. State of Nevada*, 6 Wall. 35. No such effect can be given to the recent legislation of congress imposing burdens, by way of license fees or taxes, on various occupations, with a view of raising revenue. It has been decided that these laws imposed a license fee only as a species of taxation, without payment of which the business could not be lawfully carried on, but which, nevertheless, did not propose to make any business lawful which was not lawful before, or to relieve it from any burdens or restrictions imposed by state legislation. *License Tax Cases*, 5 Wall. 462; *Pervear v. Commonwealth*, id. 475; *Commonwealth v. Holbrook*, 10 Allen, 200. The law before us being such as we have indicated, a tax by way of license upon a particular trade or business

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carried on entirely within the limits of the state, by persons not permanent residents of the state, we are clearly of opinion it is not invalid or unconstitutional by reason of this clause of the constitution of the United States.

2. Is it repugnant to the clause entitling the citizens of each state to all privileges and immunities of citizens of the several states?

Before adverting to the decisions upon this clause, it is proper, in this connection, to notice the argument that the law discriminates, and imposes a higher rate of taxation upon manufactures of other states, and goods located beyond the limits of Maryland, and upon those who sell them, than is imposed on similar goods located in Maryland, and sold here by resident traders. It is to be observed that no direct state tax can reach goods outside of the limits of the state; but if we assume the effect of the law is to make discrimination in favor of the resident trader, and to protect the manufacturing and business welfare of the state, we know of no decision, of either state or federal courts, which would authorize us to pronounce it unconstitutional and void for that reason. In *Brown v. Maryland*, C. J. MARSHALL expressly declined to give an opinion as to the validity of a law imposing a tax discriminating between foreign and domestic articles, and he said this with reference to importations from a sister state. In the *License Cases*, 5 How. 504, the laws of several states imposing taxes, licenses and restrictions upon the sale of spirituous liquors were sustained as constitutional and valid, and we do not perceive why the reasoning of the judges, who upheld the validity of restrictions thus imposed by state legislation, may not apply with equal force to other cases. A trade in other articles may be carried on in the limits of a state in such mode and by such means, by persons not its permanent residents, as to prostrate the commercial and manufacturing interests and business energies of its citizens, impede the growth of its cities, and be highly detrimental to the general welfare and prosperity of its people; and, if so, may not restrictions and discriminating taxation, if not amounting to actual prohibition, be legitimately imposed upon it by state authority? Indeed, Mr. Justice MCLEAN, in illustrating his views in these cases, makes the pertinent remark: "A state cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, or impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other similar articles in the state, either specifically or in the

form of a license to sell. *A license may be required to sell foreign articles, when those of a domestic manufacture are sold without one.*" Discriminations to this extent are made in the license laws of almost every state. In the case of *The People v. Thurber*, 13 Ill. 544, where a law imposing a tax of three per cent on premiums charged by agents of foreign insurance companies was assailed, the court held it not to be a tax on property, but a burden imposed on the agent for the right of exercising a franchise or privilege within the state, which the legislature would have the right to withhold or inhibit altogether. "It would be strange," says the court, "if the legislature had not the power to prescribe the terms upon which foreign corporations should be permitted to come into this state and carry on their business, or even to prohibit them altogether." And in *R. M. Charlton*, 26, it was decided by Judge BERRIEN, in 1816, that a law imposing a tax of fifty cents on the hundred dollars on all goods, wares and merchandise, not the produce of the state, *which shall be sold on commission* in the city of Savannah by any person residing in its limits, was a legitimate exercise of power by the state, as a regulation of its own internal trade and commerce.

But, without pursuing this series of decisions further, let us see if there is any thing in the clause as to "privileges and immunities," which is contravened by the act before us. The supreme court have declined to give a general construction to this clause. In *Conner v. Elliott*, 18 How. 593, they said: "We do not deem it needful to attempt to define the meaning of the word privileges in this clause of the constitution. It is safer and more in accordance with the duty of judicial tribunals to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein. And especially is this true, when we are dealing with so *broad a provision*, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct, and a failure to make it so would certainly produce mischief." A partial construction was given by this court in *Campbell v. Morris*, 3 H. & McH. 554, to the effect that "it means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizen of the state is protected. It means such property shall not be liable to any taxes or burdens which the property of the citizen

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is not subjected to. It may also mean that, as creditors, they shall be on the same footing with the state creditor in the payment of the debts of a deceased debtor. It secures and protects personal rights." In the enumeration made by Judge WASHINGTON, in *Corfield v. Coryell*, 4 Wash. C. C. 381, are included "the right of a citizen of one state to pass through or reside in any other state, for the purpose of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state." And in *Crandall v. The State*, 10 Conn. 344, C. J. DAGGETT held, that should a citizen of Connecticut purchase a farm in Massachusetts, and the legislature of Massachusetts tax the owner of that farm four times as much as they would tax a citizen of Massachusetts, because the one resided in Connecticut and the other in Massachusetts, or should a law be passed by either of those states that *no citizen* of the other should reside or trade in its limits, such laws would be unconstitutional as violative of this clause in the constitution of the United States.

These decisions certainly show that the provision is effective to prevent the property, real or personal, owned by a non-resident, and located in the state, from being subjected to any higher rate of state taxation than similar property of resident owners, but, in our judgment, they do not cover the present case. The law before us is not a tax upon either person or property, but on a particular *trade* or *business* carried on in the state, and cannot, in our opinion, be regarded as imposing a higher rate of taxation upon non-residents than upon citizens, either in respect to person or property. Nor do we perceive it to be in any other respect unjust, unfair or discriminating in operation and effect. We have shown that the state has power to impose a license tax on all trade or business carried on in its borders, whether by its own citizens or those of other states. The resident owner or trader is required to take out a license to carry on his business or trade, and his property and goods here situated are also subject to state, county and city taxation. There is nothing upon the face of the law, or in this record, to show that the non-resident trader, doing the business thus taxed, is thereby subjected to *heavier taxation* than the resident merchant carrying on the like retail or wholesale business. It certainly cannot be said

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to be an immunity or privilege secured by this clause of the constitution, that a non-resident merchant or trader shall be permitted to come into a state, and trade or do business therein, and pay neither a license tax on his trade nor a tax on his property, while the resident merchant must pay both; to have all the advantages of a resident trader and escape all taxation to which the latter is subjected. The law does not prevent his bringing his goods here, and selling them in the same mode, and subject to the same tax, as that imposed on all the citizens of the state, but simply provides that if he keeps his goods elsewhere, and seeks to carry on the business of selling them here, by card or sample, he shall pay a certain tax, by way of license, for so doing, and there is nothing to show, and nothing in our license laws from which it can be inferred, that the rate of license thus required exceeds *in amount* the *taxes* to which the resident trader is subjected.

We do not, however, rest our decision altogether upon this ground, for we are further of opinion that, even if this law is to be regarded as restrictive and discriminating in its character and design, it still simply imposes a tax on a particular business carried on in a particular mode within the limits of the state, which it is perfectly competent for the legislature to regulate and restrain, and in so doing has violated neither of the clauses of the constitution of the United States to which reference has been made. The judgment is accordingly affirmed.

Judgment affirmed.

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(31 Md. 330.)

*Dower in mortgaged estate.**

Where the wife unites with the husband in a mortgage of real estate belonging to him, and the property is sold under a decree of foreclosure, she is entitled to dower in the surplus only after the payment of the mortgage.

Where the purchaser of the equity of redemption redeems the property, the widow is only entitled to dower by contributing her proportion of the mortgage debt.

APPEAL from the superior court of Baltimore city.

One Dr. Owens, with the concurrence of his wife, the appellee,

* In Maryland, the widow takes for life one-third of all the lands of which the husband was seized during coverture. Dorsey's Laws, vol. 1, p. 701, § 10; Md. Code, art. 45, § 5. — RRR.

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executed two mortgages upon certain lands belonging to him in 1863. In 1866, the appellant, having recovered judgment against Dr. Owens for a debt, issued an attachment thereupon, which was on the 1st of February levied on the mortgaged lands. On the 12th of the same month, Dr. Owens, without his wife's concurrence, made a deed of trust for the benefit of his creditors. Under the provisions of this deed, the lands, consisting of two farms, were sold. One farm was purchased by the appellee, and the appellant subsequently became the purchaser of the other. The lands sold for more than the amount of the mortgages, neither of which were then due, leaving a surplus to be applied in the attachment. Dr. Owens having died, the appellee filed a petition claiming dower out of the whole proceeds of the sale of both farms, which was allowed, notwithstanding the objection of the appellant.

H. U. Kennard and *S. Teackle Wallis*, for appellant.

Wm. C. Schley and *Wm. Schley*, for appellee.

ROBINSON, J., delivered the opinion of the court.

Two questions arise upon this appeal: First, is the appellee entitled to dower? and, secondly, if so, is she dowable in the whole proceeds arising from the sale of the mortgaged premises, or in the surplus only, after the payment of the mortgage debts?

On the part of the appellant, it is insisted that, by the execution of the mortgages, she parted with her inchoate right of dower in the legal estate, and that, by the subsequent assignment of the husband under the deed of trust, her dower was barred in the equitable estate. In other words, it is held, that the wife is not entitled to dower in an equitable estate under the provisions of section 5 of article 45 of the Code, unless it is held by the husband at the time of his death.

We do not understand, however, the cases of *Hopkins et al. v. Frey*, 2 Gill, 363, and *Miller v. Stump*, 3 id. 310, to go to this extent.

In the former, it was decided that the widow was not entitled, because the husband parted with the equitable estate prior to the passage of the act of 1818, ch. 193, under which she claimed.

And, in *Miller v. Stump*, although it was held that she could not recover it as against the purchaser, yet the court said: "It may be asked whether she cannot claim, in lieu of the one-third of the land,

a portion of the surplus. In some cases, it may be argued that the widow is entitled to a portion of the surplus. It is not necessary, however, upon this appeal, to inquire if such be the law of this case. If, indeed, she be entitled to receive any thing, she is not to receive it of the purchaser."

Here is a very strong intimation that the widow may be entitled to dower in the surplus. Certainly, it cannot be said that the court decided that she was neither entitled to dower in the land nor in the surplus. The latter was left as an open question.

But, in this case, it must be remembered, the husband was seized of a legal title, upon which the wife's inchoate right of dower attached by the common law. And can it be said that, pledging this right to secure her husband's indebtedness, she thereby puts it in his power, or that of his creditor, to defeat it altogether? To this view we cannot yield our assent. The husband may assign the equity of redemption, but no act of his could deprive the widow of the right to redeem to which she is entitled under the common law.

Moreover, in this case, it cannot be held that the husband parted with the equitable estate, within the supposed meaning of the court, in *Miller v. Stump*. There was no sale here by him for a money consideration, but the assignment was made to trustees, in order that they might sell and apply the proceeds toward the extinguishment of the very mortgages in favor of which the wife had pledged her dower right. It was, in fact, but a conversion of the equity of redemption into money, for the benefit of creditors.

Now, would it not be a construction equally strange and unjust to say that the widow is not entitled to dower in the legal estate because she parted with it by joining her husband in the execution of the mortgages? nor can she claim it in the equitable estate, because that was conveyed by the husband to trustees to sell, and apply the proceeds to the extinguishment of the mortgages. So, that between the two, the dower is altogether defeated.

It will be observed that we have treated the mortgagee as holding the legal title; for such we understand to be his estate by the common law.

In the case of the *George's Creek Coal and Iron Co's Lessee v. Detmold*, 1 Md. 225, where there was a mortgage with a covenant that the mortgagor should remain in possession and receive the rents and profits until forfeiture, it was held that such a covenant operated

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as a re-demise, and that, until the breach, the mortgagee could not maintain ejectment against the mortgagor, because to sustain such an action he must not only have the legal title, but the right of possession.

There is nothing in the decision of this case that conflicts with the relations of the mortgagor and mortgagee as they existed at common law.

It is our opinion, therefore, in this case, that the assignment by the husband under the deed of trust does not defeat the appellee's right of dower.

If this be so, then in what is she to be endowed? — the whole proceeds of the sale, or the surplus only?

We have not been able to find any decision in England upon this question, and, in fact, it was not until the statute of 3 and 4 William IV, ch. 105, that the wife was entitled to dower in an equitable estate.

In this country, however, where the dower right in the equity of redemption is established by judicial decision, or conferred by statutory provision, we find a number of cases directly bearing upon the point.

Without extending this opinion by an examination of all the authorities, we think it may be said that they fully establish this general principle, that where the wife unites with the husband in a mortgage of real estate belonging to him, and the property is sold under a decree of foreclosure, she is entitled to dower in the surplus only after the payment of the mortgage.

In support of this we refer to *Smith v. Jackson*, 2 Edw. Ch. 28; *Titus v. Neilson*, 5 Johns. Ch. 452; *Tabele v. Tabele*, 1 id. 45; *Jennison v. Hapgood*, 14 Pick. 345; *Hartshorne v. Hartshorne*, 1 Green's Ch. 349; *Hinchman v. Stiles*, 1 Stock. Ch. 349; *Harrow v. Johnson*, 3 Met. 578; *Hawley v. Bradford*, 9 Paige, 201; *Vartie v. Underwood*, 18 Barb. 561; and *Mantz v. Buchanan*, 1 Md. Ch. Dec. 206.

We think, also, the rule is well settled, that where the purchaser of the equity of redemption redeems the property, the widow is only entitled to dower by contributing her proportion of the mortgage debt. In 1 Scribner on Dower, 508, it is thus stated: "The rule exacting contribution from the widow, where a person deriving title through the husband has redeemed the lands from a mortgage binding upon her interest, as a condition upon which she will be let into dower is fully established in numerous decisions in this country."

In *Swaine v. Penne*, 5 Johns. Ch. 482, the chancellor said: "The plaintiff was a party to the mortgage to Dunn, and her claim to dower was only in the equity of redemption, or the interest which her husband had remaining in the land after satisfaction of the mortgage. The redemption was for her benefit so far as respected her dower. To allow her dower in the land without contribution, would be to give her the same right that she would have been entitled to if there had been no mortgage, or as if she had not duly joined in it."

In this case, the husband conveyed to the trustees the equity of redemption, and under the terms of the deed they could sell nothing more. The purchaser took it subject to the liens and incumbrances then existing—the mortgagees—the lien of the appellee, a judgment creditor, and the claim of the widow to dower, whatever it might be. If the purchaser redeemed the mortgages, or if they are redeemed by the trustees out of the proceeds of the sale, is it not too clear for argument that the widow could only be let into dower as against him by contributing her proportion of the mortgage debt? If waiving her dower in the land, she consents to look to the proceeds of sale, how does it change the aspect of the case? The equity of redemption being the only interest which the trustees could sell, that interest is represented by the surplus after the payment of the mortgages. In that only can she be entitled to dower as against the creditors of the husband.

But it was urged that the wife having pledged her separate estate for the debts of her husband, she is entitled to the ordinary rights and privileges of a surety. This we admit is the established law of this state. *Johns. v. Reardon and wife*, 11 Md. 465. But is the inchoate right of dower recognized in the law as "the separate estate of the wife?" It certainly does not come by settlement, or gift, or devise, or in course of distribution.

It is recognized as a right of an appreciable interest and it is not liable for the debts of the husband; yet it is an interest purely contingent; the enjoyment of which depends on her surviving the husband.

In *Hawley v. Bradford*, 9 Paige, 201, this precise point arose in a case where the wife had united with her husband in a mortgage. The chancellor said: "I am not aware of any decision, however, in which the principle of suretyship has been applied to a case like the present. And the two cases which came before my learned predecessor, Chancellor KENT, were disposed of upon the supposition

that the wife, who had joined the husband in a mortgage of his estate, was not entitled to have such mortgage satisfied out of the husband's interest exclusively, so as to give her the full benefit of her dower in the whole premises, and not in the equity of redemption. The master was, therefore, right in supposing that Mrs. Bradford was not entitled to be endowed of the whole proceeds of the mortgaged premises, but only of the surplus which remained after paying the mortgage debt and the costs of foreclosure."

In *Hinchman v. Stiles*, 1 Stock. Ch. 454, the chancellor said: "It is now insisted that the widow is entitled to the whole of the five hundred and fifteen dollars and seventy-four cents. This cannot be so. She is entitled to nothing more than her dower in the equity of redemption. This sum represents that equity of redemption. She is entitled to interest on the third of it, and no more."

And in *Vartie v. Underwood*, 18 Barb. 561, where the wife had mortgaged her separate estate, and also united with her husband in a mortgage of property belonging to him, it was held that she was entitled to be substituted to the rights of a surety only as to the separate property, and as to the proceeds arising from the sale of the husband's property she was entitled to dower in the surplus only, after the extinguishment of the mortgage.

We are of opinion, therefore, in this case, that the appellee cannot be substituted to the rights of a surety, and, as against the creditors of the husband, she is entitled to dower only in the surplus after the mortgages are paid.

We are aware that the dower right is highly favored in law, and we have been anxious to affirm this decree, but a careful examination of the authorities obliges us to say that, in our opinion, it is erroneous and must be reversed.

Decree reversed, and cause remanded.

CITIZENS' BANK OF BALTIMORE, appellant, v. GRAFFLIN *et al.*

(31 Md. 507.)

Usage—money paid under mistake of fac.

To permit usage to govern and modify the law in relation to the dealings of parties, it must be uniform, certain and sufficiently notorious to warrant the legal presumption that the parties contracted with reference to it.

Where money is paid by a party under the belief that facts are different from what they actually are, and the party is not in truth bound to pay the money, he is entitled to have the same refunded if duly diligent in giving notice of the mistake.

APPEAL from the superior court of Baltimore city.

The facts are sufficiently set forth in the opinion.

Robert D. Morrison and *I. Nevitt Steele*, for appellant.

M. R. Walter and *S. Teakle Wallis*, for appellee.

STEWART, J., delivered the opinion of the court.

Grafflin & Son, the plaintiffs below, held the draft of J. P. McQuillen on John Currier, Jr., of Newburyport, Massachusetts, bearing date May 31st, 1867, and payable ninety days after date, at the Shawmut Bank, Boston, to their order, which was indorsed by them, and discounted for them by the Citizens' National Bank of Baltimore, the defendant below.

Before its maturity it was presented for acceptance, and not being accepted was protested for non-acceptance.

When the draft matured it was protested for non-payment.

The bank informed the Grafflins on the 4th of September, after the maturity of the draft, that it had not been paid, and requested them to make it good, which was done by a deposit of funds for that purpose. On the next day the bank sent down the draft, with the protests, for non-acceptance and non-payment, and the Grafflins gave their check on the bank for the amount.

These advances of money were made by the Grafflins, as alleged by them, in utter ignorance that the draft, before its maturity, had been protested in July for non-acceptance, of which fact they had not been informed.

So soon as they ascertained such had been the case, they promptly

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informed the bank that they had advanced the money to make good the draft in ignorance of the facts, and demanded the return of the money they had so paid. The bank refused to return the money.

This action was brought to recover back the money paid under such circumstances, and the verdict and judgment being against the bank it has brought up this appeal.

Exceptions were taken by both parties to the rulings of the court.

The plaintiffs below excepted to the refusal of the court to grant their first and second prayers and to the court's instruction on the subject of usage. The defendant excepted to the refusal of the court to grant its five prayers and to the second instruction given by the court.

The first prayer of the plaintiffs below was properly refused, because it asserted that the fact of the ignorance of the plaintiffs of the non-acceptance and protest of the draft in question was sufficient to entitle them to recover.

Upon the non-acceptance and protest of the draft in July, when it was presented before its maturity, if due notice of the fact had been placed in the post-office, addressed to them, such notice would have been sufficient.

Whether the plaintiffs actually received the same or not was immaterial, because the holder of the draft would have discharged its duty by giving notice in the manner aforesaid.

The second prayer of the plaintiffs was properly rejected.

Because the plaintiffs had been constant customers of the bank, which had discounted for them many like drafts, and immediately sent them on for acceptance, when the law did not require it, was no just reason to compel the bank, at the risk of being held liable for negligence, to pursue a similar course in the future.

The concession of such a favor, although repeated in sundry instances, ought not to be construed to operate as imposing upon the bank the imperative duty of its constant repetition, and as conferring upon the plaintiffs the absolute right to demand and insist upon its continuance. However much the plaintiffs might be disappointed in their expectations upon the subject, the legal relations of the parties were not changed thereby.

If such transactions between parties could be interpreted as changing or modifying the well-established rules of law, the necessary effect of such a theory would be to make the business habits of the parties, however unreasonable or preposterous, the standard to govern their contracts in the place of the provisions of the law.

Under such a state of things questions might constantly arise as to the number of the repeated acts between the parties necessary and competent to establish usage sufficient to waive or suspend the uniform rules of law otherwise applicable to their dealings.

Courts of justice, in place of expounding the law, would be continually occupied and perplexed in the ascertainment of the special law the parties had adopted to be applied to their transactions.

Is it not infinitely better that the law should be established and recognized as the guide, and have its uniform application, and that parties in their diversified dealings should be regulated and governed by its wise and exact operation?

The defendant's first and third prayers were properly rejected, because they asserted that no evidence had been given of the want of due notice to the plaintiffs of the protest of the draft for non-acceptance.

Evidence had gone to the jury tending to show that notice of that fact had not been given to the plaintiffs.

There is no cause of reversal as to the refusal of defendant's second prayer, because it had substantially the benefit of the law claimed by that prayer, in the court's instruction to the jury.

The defendant's fourth and fifth prayers were correctly refused.

If the jury were satisfied from the evidence that the plaintiffs paid the money to redeem the dishonored draft, under the circumstances described in the testimony, through inadvertence, mistake, or in ignorance of the facts in the case, but about which they might have better informed themselves by an inspection of the papers left with them by the defendant, still, the plaintiffs are not to be held absolutely bound and concluded by such recognition of the claim.

If the error or mistake exists, or is shown to have occurred, or the plaintiffs paid the money, believing the facts to be different from what they actually were, and they were in truth not bound to have paid the money, they are entitled to have the same refunded, if duly diligent in giving notice of the mistake. While "a party cannot recover money voluntarily paid, with a full knowledge of all the facts, although no obligation to make such payment exists, yet a payment cannot well be said to be made voluntarily when made in consequence alone of a false view of the facts. The assent is only induced by the conviction then prevailing in the mind that the particular facts existed, and is scarcely to be distinguished from an assent or agreement to pay on the condition the facts did exist."

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Where the plaintiff's right to have the error rectified is made out, the legal relations of the parties stand unaffected by any thing done in ignorance of the facts. "The subsequent discovery of the error destroys the whole basis of the agreement, and the parties are restored to their original condition and rights."

If the jury were satisfied from the evidence that the plaintiffs paid the money in question in ignorance that the draft had been presented in July and was not accepted, and protested for non-acceptance, and if, in fact, no notice was duly given to them through the post-office or otherwise, they are entitled to recover it back. *B. & S. R. R. Co. v. Faunce & Passmore*, 6 Gill. 68.

We concur with the ruling of the court in its first instruction, that there was no sufficient evidence of any usage prevailing with the banks in the city of Baltimore, or the Citizens' National Bank, the defendants here, to justify the jury in inferring that such usage entered into and made part of the contract between the parties in relation to the draft in question.

To permit usage to govern and modify the law in relation to the dealings of the parties, it must be uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties made their contract with reference to the usage, and not according to the general and established law applicable to the case.

The evidence for such purpose should be very strong and conclusive to authorize the usage to regulate and control the contract between the parties in derogation of the established law.

The testimony advanced in this instance, however definite as to the character of the usage in question, was not sufficient to show that it was a general and notorious usage, without which it would not furnish the criterion by which to determine and adjudicate the relative rights of the parties in conflict with the general law upon the subject.

The court's second instruction in that part of it where the language "had no notice" is employed, was calculated to mislead the jury.

If notice of the protest of the draft for non-acceptance was duly sent by mail, although never received by the plaintiffs in point of fact, such notice was all that was required to be given, on the part of the defendant, in discharge of the duty imposed upon it in relation to the draft.

But the jury, from the phraseology of the instruction and use of the terms "had no notice," may have understood it as instructing them to find for the plaintiffs, if they believed from the evidence the

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plaintiffs had in fact received no notice, or had no actual knowledge of the non-acceptance of the draft and the protest thereof.

Under this view of its character and tendency, the instruction was erroneous, and we must reverse the ruling and send the case back for a new trial.

Judgment reversed and procedendo awarded.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

LANCASTER NATIONAL BANK v. TAYLOR.

(100 Mass. 18.)

Promissory note. Transfer without indorsement.

Where a promissory note, payable to the order of a person, is transferred by him before maturity, but not indorsed until after maturity, such indorsement does not relate back to the time of the transfer, but the transferee holds the note subject to all the equities between the original parties.

Contract on a promissory note for \$1,000, signed by the defendant, payable to the order of Jonathan L. Butterick, and indorsed by him to the plaintiffs.

It appeared that the defendant intrusted to Butterick his signature to a blank note, with authority to write over it a note of one hundred dollars for the benefit of one Henry: that Butterick fraudulently filled up the note now in suit so as to make it one for the sum of one thousand dollars, payable to his own order; that he passed such note before maturity to the plaintiffs in payment of a former note, but by mistake did not indorse the same until after it became due, and after the plaintiffs had notice of the fraudulent character of the transaction.

The court below held that the plaintiffs were entitled to recover, to which ruling the defendant excepted.

G. F. Hoar, for defendant.

G. F. Verry, for plaintiff:

The plaintiffs may maintain this action in their own name. *Ranger v. Carey*, 1 Met. 369; *Crocker v. Whitney*, 10 Mass. 316; *Mowry*

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v. Todd, 12 id. 281; *Chicopee Bank v. Chapin*, 8 Met. 40; *Gardner v. Gager*, 1 Allen, 502. The facts do not afford any defense to the note in the hands of a *bona fide* holder. 1 Parsons on Notes and Bills, 110, 113, 280; *Putnam v. Sullivan*, 4 Mass. 45; *Stoddard v. Kimball*, 6 Cush. 469; *Fullerton v. Sturges*, 4 Ohio St. 529; *Young v. Grote*, 4 Bing. 253, and 12 J. B. Moore, 484; *Montague v. Perkins*, 22 Eng. Law & Eq. 516; *Cruckley v. Clarence*, 2 M. & S. 90.

FOSTER, J. The rule that the indorsee of a negotiable promissory note, who has taken it before maturity for value and without notice of any want of consideration or other defect rendering it void in its inception, can enforce it against the maker, notwithstanding it was valueless in the hands of the original payee, is founded upon the custom of merchants and the statute of 3 and 4 Anne, c. 9. It is an exception to the general rule of the common law; according to which a written promise can be enforced only in the name of the party to whom it is made, and if it has been assigned, although the assignee is allowed to bring an action upon it in the name of his assignor, yet he has no greater rights than the assignor possessed, and the instrument remains subject to every defense that would have existed if no assignment had taken place. The ordinary rule applies to all notes which are not negotiable, and to all negotiable notes which are not duly indorsed for value before maturity. A note not negotiable may be assigned and transferred like any other chose in action, but can be sued only in the name of the payee, and is liable to every defense existing against him. A negotiable note, not transferred until it is overdue, may be sued in the name of the indorsee, but as to defenses must be treated precisely like one not negotiable, and a negotiable note which is transferred before maturity, but not indorsed until afterward, in our opinion can stand on no better footing. Whoever receives it takes a contract which upon its face shows that it is subject to every defence that could have been made between the original parties. There is no custom of merchants in favor of such an assignee, and no rule of law by which he is entitled to greater rights than the payee. If the contract was originally invalid for want of consideration or other cause, so will it be in any other hands into which it passed before the legal title is transferred by regular indorsement. No such indorsement having been made before the note is overdue and dishonored, any subsequent one takes effect only from its date. There is no doctrine known to the mer-

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cantile law by which it can relate back to the time of the equitable transfer, and place the assignee in the same position as if he had been, before maturity, the holder of the note for value.

It is true a distinction between negotiable and unnegotiable notes has been recognized in regard to the set-off allowed by statute, and, where a negotiable note was transferred for value before it was dishonored, but not indorsed till afterward, a previously existing set-off of a distinct demand against the payee was not allowed to prevail. *Ranger v. Cary*, 1 Met. 369. The set-off of distinct demands is a matter regulated by statute and not a common-law defense, and the court carefully limit the application of their opinion, saying that "here is no question of want or failure of consideration of this note; no offer to prove payment of it; but the defendants rely on an account filed in off-set." This case is, therefore, no authority against the conclusion to which we are conducted by applying the elementary principles of the law-merchant.

The facts in the present action show that the defendant intrusted to Butterick his signature to a blank note, with authority to write over it a note of one hundred dollars for the benefit of one Henry; that Butterick fraudulently filled up the note now in suit so as to make it one for the sum of a thousand dollars, payable to his own order, and passed it to the Lancaster Bank in payment of a former note, that is, for a valuable consideration. But Butterick did not then indorse the note; and it remained in the hands of the bank unindorsed till after its maturity. At a later date, when the note was overdue and the bank had notice of all these facts, Butterick did indorse it; undeniably if he had done so originally the defendant would have been liable. Having placed it in the power of Butterick to perpetrate such a fraud, the injury caused by the defendant's own negligence must have been borne by himself, and not by the bank, which was in no fault, and guilty of no want of due care. But the defendant is liable only upon and to the extent of the contract which was written, and not for one which might have been but was not made. The bank saw fit to take the note, which purported to be in favor of Butterick, without requiring him to indorse it. They therefore took it subject to any defense which might be made to an action in Butterick's name, and to subsequent indorsement does not improve their position. When the note came into the hands of the bank, payable to the order of Butterick, and not indorsed by him, the very form of the instrument

gave notice that no one could bring an action upon it except in the name of Butterick, and that it was subject to every defense affecting its original validity which could have been made to it while it continued in his hands.

There is a recent English case in which this identical question has been determined by eminent judges of great experience and authority in mercantile law. A check or sight draft, obtained by fraud from the defendant by one Griffiths, was transferred for a valuable consideration to the plaintiff, before dishonor, and with no notice to him of the fraud. But the actual indorsement of the paper was not made till the instrument was dishonored and the plaintiff had notice of its fraudulent origin. On this state of facts, ERLE, C. J., said: "The intention, no doubt, was that the plaintiff should take the instrument as indorsee; but the indorsement was omitted, and while it was in the hands of the plaintiff without being indorsed, it was as if it had been an ordinary chattel that had passed by an equitable and not by a legal assignment. All the rights, therefore, that the plaintiff had at that time at law were such as Griffiths had, and no more. Then Griffiths, having defrauded the defendant of the bill, could have no right to it as against the defendant. The law relating to negotiable instruments is, that the fact of delivery gives to the person who takes the instrument a title which is good as against all the world, notwithstanding there may be some defect in the title of him from whom the bill is taken, provided it is taken by indorsement for value and without notice of the fraud, which constitutes the defect in title. Now the title which the plaintiff gained on the delivery of this instrument was not like that which he would have obtained on the delivery of a negotiable instrument not requiring indorsement; it was yet incomplete, but capable of being perfected by indorsement. Before he had obtained the indorsement he was not within the rule of law I have mentioned; and when he did obtain it he had notice that he could not gain any title to the bill on account of the fraud practiced on the drawer." In the same case, WILLES, J., said: "The general rule of law is, *nemo dat, qui non habet*; but in the case of negotiable instruments, in order that they may circulate freely, and that persons may not on every occasion be put to the trouble of inquiring into their origin and the transactions between the original parties to the bill, there is an exception to the above rule, and a person taking a bill during its currency, for value, and without notice of any fraud perpetrated by him from whom he takes it, is entitled

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to sue any person whose name is on the bill, notwithstanding that the person against whom he brings his action was originally defrauded of that bill. It is necessary, however, that the bill should have been indorsed to the holder and taken by him during its currency, and not after it became due; for a person who takes a bill in any manner after it has become due takes it subject to all the equities between the antecedent parties. The person who claims the benefit of this law relating to bills of exchange must prove that he is entitled to do so; he must show that he took the bill by indorsement for value and without notice of fraud. This is a doctrine of the law-merchant in favor of those who have acquired by their diligence a complete title. The plaintiff has failed to show that he has done so, and cannot now recover upon it." *Whistler v. Foster*, 14 C. B. (N. S.) 248.

In the opinion of a majority of the court, these citations express with fullness and accuracy the rule, and the limitations of the rule, of the law-merchant, which gives to the *bona fide* indorsee for value before maturity of a negotiable instrument a better title and a more complete right of action than the original payee of the instrument may have possessed. The learned judge at the trial having proceeded upon a different view of law, the

Exceptions are sustained.

ALDRICH V. BOSTON AND WORCESTER RAILROAD COMPANY.

(100 Mass. 81.)

Warehousemen — responsibility of.

Warehousemen are responsible for due care in storing the goods intrusted to them in a place of reasonable safety, and are to be charged only upon proof of their own negligence, or that of their servants in the course of their employment.

Where servants of warehousemen are present during the destruction of the warehouse by fire in the night-time, their neglect to remove goods from the warehouse is not such negligence as will charge the warehousemen, unless it be shown that such was a part of the service for which the servants were engaged.

The facts appear in the opinion of the court.

G. S. Hale and *F. P. Goulding*, for defendants.

H. B. Staples and *T. G. Kent*, for plaintiff.

HOAR, J. (after settling a question of practice). The action is brought to recover the value of goods destroyed by fire, which were in the custody of the defendants, as warehousemen. The goods were in the freight-house at Milford, which was burned in the night-time with its contents. The fire, for which it is agreed that the defendants were not responsible, was caused by the burning of another building in the neighborhood; and the only ground of liability charged at the trial was the negligence of their agents in not removing the goods from the freight-house at the time of the fire.

It appeared that different persons in the defendants' employment came upon the ground from time to time, and evidence was offered to show that with due care and diligence they might have saved the plaintiff's property. There was no evidence that the general agent who had charge of the freight-house heard the alarm or was present at the fire; or that he was in any fault for not being there. The servants of the company who were present were, a clerk employed to check freight as it was received and to help deliver it; a baggage-master and brakeman; a road-master and superintendent of the repairs of the track; another baggage-master, who had charge of the freight-house in the day-time, and locked it at night, but did not keep the key; and a clerk employed to receive freight.

The legal obligations of the defendants as warehousemen is well

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settled by the authorities, and there is no substantial difference between the parties respecting its nature and extent. They are responsible for due care in storing the goods in a place of reasonable safety, and are to be charged only upon proof of their own negligence, or that of their servants in the course of their employment. That they are not insurers against loss by an accidental fire.

As the defendants furnished a suitable warehouse, properly secured, in which the goods were deposited, they had done their whole duty, until the time came when, upon reasonable notice of danger, an obligation should arise to remove them. *Tobin v. Morrison*, 5 Moore P. C. 110. They were not chargeable with the negligence of any of their servants, unless it was negligence within the scope of the servants' employment. And a true test of this liability may be found in the question, whether any one of the defendants' servants who were present at the fire would be answerable to his employers for a neglect of his duty. The answer to this question, upon the evidence reported, seems to us perfectly plain. It was no part of the service for which either of them was engaged to attend to the removal of goods from the freight-house in case of a fire in the night. Neither of them was under any obligation, by reason of his employment, to rise in the night and be present at the fire. Neither of them had any custody, or responsibility for the safety, of the goods at that time. If they were under no obligation to be present, their voluntary attendance imposed upon them no legal liability for mere omission to do any thing when on the spot. It is a mere confusion of terms to say that the servants of the company were present, and neglected to remove the goods. They were not then and there, in any legal sense, the servants of the company. Whatever they did was done by them as volunteers, as neighbors and citizens. They had the full control of their own time and labors. They had the right to choose for themselves whom they would assist, and whose goods they would try to save; and, in making the choice, they in no manner implicated the railroad, or assumed any of its obligations.

As the clerks, brakeman and baggage-master, and superintendent of track repairs, were under no legal liability to the defendants for their omissions at the fire, it follows, therefore, that the defendants are not chargeable with their neglect any more than with the neglect or inefficiency of any other persons who were there; and the whole foundation of the action fails. *New trial granted.*

BURROUGHS and ano. v. NORWICH AND WORCESTER RAILROAD CO.

(100 Mass. 22.)

Common carriers—responsibility for goods lost on connecting lines.

a corporation, established for the transportation of goods for hire between certain points, and receiving goods directed to a more distant place, is not responsible beyond the end of its own line, as a common carrier, but only as a forwarder, unless it make a positive agreement extending its liability.

A station agent of a railroad corporation has not authority to bind such corporation as common carriers beyond the line of its own road, by signing receipts furnished in blank by a shipper, and by the terms of which the corporation undertakes to forward and deliver the goods to the order of the consignee at points on a connecting line, where it appears that such agent acted without special authority, and without the knowledge of the corporation, and that the officers of such corporation had furnished such agent with blank forms of receipts, to be given for goods shipped beyond their own line, by which it was provided, that in case of loss or damage of the goods, the corporation only should be responsible in whose actual custody the goods should be at the time.

A contract between two connecting lines of common carriers, which provides among other things, that the gross receipts for transportation on the through line should be divided in a certain proportion between the two corporations, but that "loss or damage occasioned by injuries to person or property on said line shall be borne by the party having possession of the same at the time the injuries were done," gives a person who delivers goods to one corporation, to be transported to a point on the route of the other corporation, no right of action against the first corporation for the loss of the goods while in the possession of the second.

Where a plaintiff seeks to treat a "freight tariff" between points on two connecting lines, and which provides for the responsibility of "the line" for goods shipped over it, as a contract between himself and the defendants, varying what would otherwise be the legal liability of the latter, he is bound by its provisions, and a declaration in such tariff that "the line" will not be responsible in certain cases is controlling in those cases.

The facts appear in the opinion.

T. L. Nelson and W. W. Rice, for plaintiffs.

F. H. Dewey and F. P. Goulding, for defendants.

GRAY, J. The railroad of the defendant corporation extends from Worcester in this commonwealth to New London in the state of Connecticut. The Norwich and New York Transportation Com-

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pany is a corporation established in Connecticut, owning and running steamboats between New London and the city of New York. The two corporations carried on the business of transporting goods for hire by means of said railroad and steamboats, under a written contract between them, and advertised the route thus formed as the Norwich line, to distinguish it from other lines to and from New York; and freight-tariffs, signed by the agents of both companies, were posted in the defendants' stations. The plaintiffs delivered to the defendants at their station in North Oxford in this commonwealth six bales of goods, marked and addressed to Turnbull, Slade & Company, New York, to be carried for hire over said line to New York. These goods were carried in due course of business over the defendants' railroad to New London, and there, by the agent of the Norwich and New York Transportation Company, placed on board one of its steamboats, which started with the goods on board, bound for New York, but on its passage through Long Island Sound came into collision with a sailing vessel, and was thereby disabled, set on fire, burned to the water's edge, and sunk, and the plaintiffs' goods destroyed. The plaintiffs seek to charge the defendants for this loss as common carriers.

The law is well settled in this commonwealth, and in most of the United States, that a corporation established for the transportation of goods for hire between certain points, and receiving goods directed to a more distant place, is not responsible, beyond the end of its own line, as a common carrier, but only as a forwarder, unless it makes a positive agreement extending its liability. *Nutting v. Connecticut River Railroad Co.*, 1 Gray, 502; *Judson v. Western Railroad Co.*, 4 Allen, 520; *Darling v. Boston and Worcester Railroad Co.*, 11 id. 295, and cases cited; *Perkins v. Portland, Saco and Portsmouth Railroad Co.*, 47 Maine, 573; *Brintnall v. Saratoga and Whitehall Railroad Co.*, 32 Vt. 665; *McMillan v. Michigan Southern and Northern Indiana Railroad Co.*, 16 Mich. 119, 120.*

* This principle is also laid down in the following cases: *Van Santvoord v. St. John*, 6 Hill, 157; *Farmers' and Mechanics' Bank v. Champlain Transportation Co.*, 18 Vt. 131, 140, and 23 id. 136, 309; *Hood v. N. Y. and N. H. Railway Co.*, 23 Conn. 1; *Elmore v. Naugatuck R. R. Co.*, 23 id. 457; *Naugatuck R. R. Co. v. Waterbury Button Co.*, 24 id. 468. A contrary doctrine has been held in *Weed v. Schenectady and Saratoga R. R. Co.*, 19 Wend. 534; *Wilcox v. Parmelee*, 3 Sandf. 610; *Illinois Central R. R. Co. v. Copeland*, 34 Ill. 332; *Western Transportation Co. v. Newhall*, 24 id. 466; *Illinois Central R. R. Co. v. Johnson*, 34 id. 389; *Noyes v. Rutland and B. R. R. Co.*, 37 Vt. 110; *Bennett v. Flynn*, 1 Fla. 408; *Teal v. Sears*, 9 Barb. 317. In New

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The plaintiffs seek to charge the defendants, as common carriers, beyond the line of their railroad, upon three grounds:

1. The plaintiffs in the first place rely upon the terms of the receipt, signed and delivered to them by the defendants' station-agent at North Oxford at the time of receiving the goods, by the terms of which the Norwich and Worcester Railroad Company "promises to forward and deliver" the goods to the order of Turnbull, Slade & Co., New York. It is agreed that this station-agent had been accustomed to give to the plaintiffs precisely similar receipts for goods delivered by them to the defendants at this station to be transported. But it is also agreed that the blank forms of these receipts were furnished by the plaintiffs themselves; that the officers of the corporation did not know that such receipts were given by the station-agent; and that the receipts supplied by those officers to the station-agents, and which such agents were accustomed to fill up, sign and deliver, when requested, for goods to be transported to New York, were of a different form, and provided that the goods should be transported by the defendants to New London, and thence by the steamboats of the Norwich and New York Transportation Company to New York, and that, in case loss or damage should be incurred, that company alone should be responsible therefor in whose actual custody the goods might be at the time of such loss or damage. It is agreed that the station-agent at North Oxford was the proper person to receive and sign receipts for goods delivered at his station, but that he had no other authority to sign and deliver to the plaintiffs the receipt relied upon, than may be implied from the facts above stated. And we are of opinion that these facts are clearly insufficient to warrant a court or jury in inferring that he had authority to bind the defendants as common carriers beyond the line of their own railroad.

The English cases in which a station-agent has been allowed to bind the corporation by a contract to carry beyond its own line are of no weight in this case, because the law of England does not make the distinction which our law does between goods which are and goods which are not addressed to a place beyond the corporation's own line, but holds that in either case the corporation is liable as a common carrier to the ultimate destination. *Wilson v.*

York, railroad companies receiving goods for a point on a connecting line are made liable as common carriers beyond their own route. Laws of 1847, ch. 370, § 2. — *Var.*

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York, Newcastle and Berwick Railway Co., 18 Eng. Law & Eq. 557; *Scothorn v. South Staffordshire Railway Co.*, 8 Exch. 341; *Bristol and Exeter Railway v. Collins*, 7 H. L. Cas. 194.*

2. The plaintiffs next rely upon the written contract between the two corporations in regard to the transportation of goods between the defendant's stations and New York. But this contract expressly provides that "loss or damage occasioned by injuries to person or property on said line shall be borne by the party having possession of the same at the time the injuries were done." As, at the time of the destruction of the plaintiffs' goods, they were in the exclusive possession of the steamboat company, this contract gives the plaintiffs no right of action against the railroad corporation. *Gass v. New York, Providence and Boston Railroad Co.*, 99 Mass. 220; *Converse v. Norwich and New York Transportation Co.*, 33 Conn. 166.

3. The only other evidence on which the plaintiffs rely is the "freight tariff between New York and stations on Norwich and Worcester railroad by steamers of the Norwich and New York Transportation Company and the Norwich and Worcester railroad," copies of which were posted in the defendant's stations. But, if the plaintiffs treat this notice as a contract between themselves and the defendants, varying what would otherwise be the legal liability of the latter, they are bound by its provisions. *Squire v. New York Central Railroad Co.*, 98 Mass. 239, and cases cited. And it is expressly provided therein that "this line will not be responsible for collisions, damages and accidents from steam, fire, sea, rivers." If such was the contract between the parties, the carriers were exempted from liability for loss of the plaintiff's goods by collision or by fire.

In every aspect of the case, therefore, the plaintiffs fail to maintain their action, and there must be

Judgment for the defendants.

* *Muscamp v. The Lancaster and Preston Junction Railway Co.*, 8 M. and W. 481, is a leading case to the same effect. *Coxon v. The Great Western Railway Co.*, 5 H. and N. 714, and *Directors of B. and E. Railway Co. v. Collins*, id. 908, follow the same rule. See, however, *Garside v. The Trent and Mersey Navigation Co.*, 4 T. R. 581. — RMR.

PUTNAM V. BOND.

(100 Mass. 59.)

Deed—latent ambiguity. Boundary by town line.

Where the legal line between two towns differs from the line universally recognized by the inhabitants of the towns, a deed describing a boundary in terms equally applicable to either line, contains a latent ambiguity, which may be cleared up by oral evidence.

Although the presumption would be that the deed conveyed to the legal line, that presumption would be rebutted by proof that a different line had been adopted and universally recognized by the inhabitants of the two towns.

There is no absolute presumption of law that parties to a deed intend to govern themselves by a boundary line adopted by towns or town officers, and which does not accord with the legal line; and where the words which they use are equally applicable to either, it is for the jury, upon a consideration of all the circumstances, to determine which line was actually meant.

Action of tort for trespass on lands. The plaintiff and defendant owned adjoining farms, separated by the line between the towns of Shirley and Lunenburg, the plaintiff's land lying in the latter. The line between these towns was established by the statute of 1848, c. 194. The deeds through which the plaintiff derived title were dated respectively 1795, 1837, 1846 and 1848, and described the eastern boundary as on Shirley line; in the last two,—“Shirley old line;” the courses and distances in all of which would include the place of the alleged trespass. Evidence was introduced by the plaintiff that the line to which he claimed—differing from the statutory line—had been perambulated as the town line from 1830 to 1848, and that it was recognized as the town line by the inhabitants of the respective towns.

The defendant's deed bounded his lands west by the “Lunenburg line,” and he offered evidence to show that the statutory line was the true original record line. The verdict was for the plaintiff, and the defendant alleged exceptions.

F. H. Dewey and F. P. Goulding for defendant.

G. A. Torrey, for plaintiff.

GRAY, J. The boundary called for in the deeds of the plaintiff “Shirley line,” and in the deed on which the defendant relied,

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"Lunenburg line." These words would be equally satisfied by the line which was in law the boundary between the towns, or by a line which was universally considered and reputed to be such boundary at the time of the making of the deeds in question. Evidence was introduced at the trial that the legal line between the towns differed from what it was universally supposed to be, and thus disclosed a latent ambiguity, which could only be cleared up by oral evidence. The case comes exactly within the familiar maxim, as long ago expounded by Lord Bacon, *ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*. *Ambiguitas latens* is that which seemeth certain and without ambiguity for any thing that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity; "as, if I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all; but if the truth be that I have the manors both of South S. and North S., this ambiguity is matter in fact; and, therefore, it shall be holden by averment, whether of them, was that the party intended should pass." Bacon. *Max. reg.* 25.

In the case of *Cook v. Babcock*, 7 Oush. 526, on which the defendant relies, the deed of land in Blandford, bounded "north on the line of said Blandford," which was held to be limited to the legal boundary line of the town, was made after that line had been established by acts of the legislature; the evidence offered and held incompetent went no further than to show that before those acts a different line, defined by marked trees, had been understood and reputed to be the boundary line of Blandford; and Chief Justice SHAW distinguished the case from such a one as the present, saying: "When, indeed, upon application of the description to the land, it is doubtful what was intended, this is a latent ambiguity, and then evidence *aliunde* may be given; as where a description gives the line as running to a maple tree marked, and two maple trees are found, either of which would answer the description; and again: "When the true line had been long doubtful, and conveyances have been made, bounding on the reputed or supposed line, or line of actual holding and possession, and such reputed or supposed line is capable of being shown by proof, such conveyances will have their full effect in passing the land up to such supposed line, though a different line be afterward fixed by the legislature as the true line by a declaratory act." We fully concur with the judgment and the reasons of the supreme

court of New Hampshire in *Hall v. Davis*, 36 N. H. 569, in which it was held that the words "Derry old line," used in a deed to define a boundary, were susceptible of various meanings, as the original line of Londonderry, or any other line marked by monuments and called by that name; and that evidence that there was such another line showed such an ambiguity in the words of the deed as to admit of parol testimony to prove which line was intended to be designated thereby. Another good illustration of the principle is afforded by the case of *Sutton v. Bowker*, 5 Gray, 416, in which goods were, by the terms of a bill of lading, to be delivered "at the Essex railroad wharf;" it appeared that the Essex railroad company owned but one wharf, and there was another generally known as the Essex railroad wharf, and used by the railroad company to receive merchandise at; and it was held that, for the purpose of showing that the latter wharf was intended, evidence of the comparative ease of access and rate of freight to the two wharves, and of the previous dealings of the parties under similar bills of lading, was admissible.

In the case at bar, the jury were, therefore, rightfully instructed that, although the presumption upon the face of the deeds would be that they conveyed to the true record line, yet that line was not necessarily the boundary between these parties; but if a different line was shown to exist, adopted by the towns and their inhabitants, and considered universally (which would include the parties to the deeds) to be the Shirley and Lunenburg line, that would be the boundary referred to in the conveyances.

But in one particular the instructions of the learned judge who presided at the trial were not sufficiently guarded. The plaintiff had offered evidence that from 1830 to 1848, the line to which he claimed had been perambulated as the town line between Shirley and Lunenburg; and the jury, besides the instructions already mentioned, were instructed that, "if the towns of Lunenburg and Shirley had adopted a line different from the true one, as the line between the towns, the deeds would convey to that line, if there were no monuments to fix the line intended." This instruction was erroneous. The towns had no power to alter the boundary line between them. The perambulations of the boundaries of the towns by the selectmen, in the execution of the duties imposed upon them by law, were doubtless competent, but they were not conclusive evidence of the line intended by the parties. R. S. ch. 15, §§ 1-7; *Middleborough v. Taunton*, 2 Oush. 409; *Lawrence v.*

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Haynes, 5 N. H. 33. And there is no absolute presumption of law that parties to a deed intend to govern themselves by a boundary line adopted by towns or town officers, which is proved not to accord with the true and legal boundary line; and when the words which they use are equally applicable to either, it is for the jury, upon a consideration of all the circumstances, to determine which was actually intended.

Exceptions sustained.

STOOPS v. SMITH.

(100 Mass. 68.)

Oral evidence to explain written contract.

Oral evidence is admissible for the purpose of applying the terms of a written contract to the subject-matter, and removing any ambiguity arising from such application.

In an action on a written contract to pay "fifty dollars for inserting business card in two hundred copies of his advertising chart, to be paid when the chart is published," etc., oral evidence is admissible to show that, at the time the contract was made, the plaintiff agreed to make the chart of a certain material, and to publish it in a certain manner.

ACTION of contract to recover money for advertising under the following agreement, signed by the defendant:

"Worcester, August 30, 1866.—I promise to pay Walter Stoops the sum of fifty dollars for inserting business card in two hundred copies of his advertising chart; to be paid when the chart is published and the card appears, to the exclusion of all others in the sewing machine trade." The plaintiff alleged full performance on his part, and the refusal of the defendant to pay the agreed sum. The defendant set up non-performance. At the trial the plaintiff introduced evidence showing the making of the contract, the printing of two hundred charts containing the said card, to the exclusion of others in the trade, and the publication of the chart by distributing them to those whose cards were printed. The defendant asked the judge to rule that the publication was not sufficient, which request was refused. The defendant then offered to show

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that, at the time the agreement was made, the plaintiff represented that the charts were to be made of cloth; that he should publish the same by hanging them up in two hundred of the most conspicuous public places, such as hotels, railroad stations, etc., within forty miles of Worcester; that the defendant made the contract relying on these representations; that the plaintiff did not make said charts on cloth, but on paper; that the parties to whom they were distributed had not made any exhibition or publication of them whatever; and that, by reason of the plaintiff's failure to publish the charts as agreed, the defendant had derived no benefit therefrom. The judge declined to receive the evidence, and a verdict was rendered for plaintiff. The defendant alleged exceptions.

G. F. Verry, for defendant.

F. H. Dewey and *F. P. Goulding*, for plaintiff.

WELLS, J. The writing upon which this action is brought contains a promise on the part of the defendant only. It recites, imperfectly and in general terms, the agreement to be performed on the part of the plaintiff as the consideration upon which the promise of the defendant is made. At the trial, the defendant offered evidence to show the whole arrangement between the parties; particularly the representations of the plaintiff as to the material of which the chart was to be made, and the manner in which it would be published; and contended that he was not bound to pay, because the plaintiff had failed so to make and publish the chart. The court excluded the evidence, and ruled that no evidence of extrinsic facts was admissible for any purpose.

The alleged representations related to that which was then in the future, and were, in one aspect, of a promissory nature. The principle of law is clear and well settled, that the obligations of a written contract cannot be abridged or modified by, or made conditional upon, another preceding or contemporaneous parol agreement not referred to in the writing itself. *Trustees of Church in Hanson v. Stetson*, 5 Pick. 506; *Wakefield v. Stedman*, 12 id. 562; *St. Louis Insurance Co. v. Homer*, 9 Metc. 39; *Adams v. Wilson*, 12 id. 138; *Underwood v. Simonds*, id. 275; *Hanchet v. Birge*, id. 545; *Prescott Bank v. Caverly*, 7 Gray, 217; *Small v. Quincy*, 4 Greenl. 497. But it is equally well settled that, for the purpose

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of applying the terms of the written contract to the subject-matter, and removing or explaining any uncertainty or ambiguity which arises from such application, parol testimony is admissible, and has a legitimate office. For this purpose, all the facts and circumstances of the transaction out of which the contract arose, including the situation and relations of the parties, may be shown. *Gerrish v. Towne*, 3 Gray, 82; *Herring v. Boston Iron Co.*, 1 id. 134; *Sutton v. Bowker*, 5 id. 416; *Bradley v. Washington, Alexandria and Georgetown Steam Packet Co.*, 13 Pet. 89; *Price v. Mouat*, 11 C. B. (N. S.) 508. The subject-matter of the contract may be identified by proof of what was before the parties, by sample or otherwise, at the time of the negotiation. *Bradford v. Manly*, 13 Mass. 139; *Hogins v. Plympton*, 11 Pick. 97; *Clark v. Houghton*, 12 Gray, 38; *Haven v. Brown*, 7 Greenl. 421. The terms of the negotiation itself, and statements therein made, may be resorted to for this purpose. *Foster v. Woods*, 16 Mass. 116; *Sargent v. Adams*, 3 Gray, 72; *Mumford v. Gething*, 7 C. B. (N. S.) 305; *Chadwick v. Burnley*, 12 Weekly Rep. (Q. B.) 1077. The meaning of ambiguous terms in the contract may be fixed by showing that a particular significance had become attached to those terms by reputation, usage of trade, or otherwise. *Woods v. Sawin*, 4 Gray, 322; *Hart v. Hammett*, 18 Verm. 127; *Putnam v. Bond*, ante, 82. The purpose of all such evidence is to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the best definition to be applied in the interpretation of the contract itself. The effort must be limited to definition of the terms used, and the identification of the subject-matter. If so limited it makes no difference that the language of the negotiations relates to the future, and consists in positive engagements on the part of the other party to the contract. Their effect depends, not upon their promissory obligation, but upon the aid they afford in the interpretation of the contract in suit. They are not the less effective for the purposes of explanation and definition because they purport to carry the force of obligation.

The contract in suit may illustrate this principle in a point that is not in dispute. The defendant agrees to pay fifty dollars "for inserting business card," etc. In applying this stipulation, if the defendant had a business card distinctively known and recognized as such, there would be no difficulty in giving effect to the contract.

But the identification of that card would involve the whole principle of admitting parol testimony for the interpretation and application of written contracts to the subject-matter. It could be done only by the aid of parol testimony. Suppose he had several business cards, differing in form and contents, but one was selected and agreed upon for the purpose at the time the contract was signed; or that one had been prepared specially for the purpose. Clearly parol testimony would be competent to identify the card so selected or prepared; and to prove that the parties assented to and adopted it as the card to which the contract would apply. Suppose, thirdly, that no such card had been selected or prepared, but its form, contents and style had been described verbally and assented to, and the plaintiff had agreed to insert it as so described. Such evidence may be resorted to, not for the promise it contains, but for the aid it affords in fixing the meaning and applying the general language of the written contract.

The same considerations render the evidence offered by the defendant competent for similar purposes. The term, "his advertising chart," requires to be practically applied. The representations of the plaintiff are in the nature of a description of the vehicle by which the publication of the business card was to be effected; and his account of the disposition he proposed to make of the charts was a description of the extent and the sense in which it was an "advertising chart." The representations as to the material of which the chart was to be made, and the mode of publication, constitute his description of what "his advertising chart" was. *Macdonald v. Longbottom*, 1 El. & El. 977.

When applied to such an article as this, the word "published" can have no fixed signification which the court can apply to the contract. What was a sufficient publication within the sense and intent of the contract must be ascertained and determined by the jury, in the light of all the facts of the case. We think the jury may consider the plaintiff's own description of the chart, and his representations as to the mode of publishing it, upon this question. *Atwood v. Cobb*, 16 Pick. 227; *Ellis v. Thompson*, 3 M. & W. 445.

It follows, that the evidence offered by the defendant was improperly excluded. It was competent for the purposes hereinbefore indicated. It was unnecessary to consider the questions which have been discussed with so great thoroughness and ingenuity of argument by the plaintiff's counsel, upon the defense of fraud

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and misrepresentation; because, in view of the case which we have taken, the whole force of the defendant's testimony will bear upon the interpretation of the contract itself.

Exceptions sustained.

HOOD v. HARTSHORN, adm'r.

(100 Mass. 117.)

Lessor and lessee: covenant in lease: appraisalment.

Where a lessor and lessee of lands covenanted in the lease that, at the expiration of the term, the value of the buildings erected on the premises by the lessee should be appraised by appraisers and paid by the lessor: *Held*, that the right of the lessee to recover for the value of the buildings was not entirely dependent upon the making of the appraisalment, but that nevertheless he was bound to do all that was reasonably in his power to procure the stipulated appraisalment; also that, in case the appraisers first selected failed to agree, the lessee must use all reasonable efforts in order to secure other appraisers; and that, whether he has done so is a question for the jury.

This action was contract on a covenant contained in a lease of land providing that, at the expiration of the lease, the buildings theretofore erected by the lessee on the premises should be appraised by three disinterested men, to be named in the manner specified, and that the lessor—the defendant's intestate—should then purchase said buildings of the lessee at the price set by the appraisers. This covenant is fully set forth in the opinion. The evidence tended to show that the appraisers were duly chosen, but, after a hearing, failed to agree, and that the defendant thereupon refused to join in choosing other appraisers, and sold the buildings and converted the proceeds to the benefit of the estate of his intestate.

The defendant offered to show that two of the appraisers had agreed upon an award, and the proceedings necessary to give validity to such award, except the concurrence of the third; also, that the lessor, after the disagreement of the appraisers, assented to a proposal of the lessee that said appraisers should again come together for the purpose of the appraisalment. This offer was overruled, the judge holding the plaintiff entitled to recover on the facts.

G. F. Hoar, for defendant.

F. H. Dewey and *W. A. Williams*, for plaintiff.

CHAPMAN, C. J. The lease bears date February 20, 1862, and is for the term of five years from the first day of August then next. It contains the following clause, on which the rights of the parties in this action depend: "And it is agreed by and between the parties, that, at the expiration of this lease, the buildings which have been heretofore erected by the lessee on the premises shall be appraised by three disinterested men, one to be chosen by the lessor, one by the lessee, and the third by the two appraisers thus chosen: and said Paine agrees to purchase said buildings of said Hood, at the price so set by said appraisers." This clause is to be construed with reference to its subject-matter. By its terms the appraisement was not to be made till the expiration of the lease. This would give no time for the removal of the buildings in case the appraisers should fail to agree; and by operation of law they would become the property of the lessor without any conveyance or transfer. It would be unreasonable to construe the agreement so as to render the obligation of the lessor to pay for them entirely dependent upon the making of an appraisement. The appraisement is to be regarded as a mere method of ascertaining the price to be paid for them, yet the stipulation concerning the appraisement is not void. It gives the lessor certain rights which are preliminary to the rights of the lessee to maintain an action for the price. It binds the lessee to do all that was reasonably in his power to procure the stipulated appraisement. It is unlike the agreement in *Phippen v. Stickney*, 3 Met. 384, in which the referees were named, and when those individuals failed to make an appraisement, the stipulated method of ascertaining the value wholly failed, there being no obligation resting on either party to appoint other appraisers. It then became proper to refer the matter to a jury. This agreement is also unlike the agreement in *McCarren v. McNulty*, 7 Gray, 139, in which the question whether the book-case should be accepted was referred to the president of the association, whose decision was final without regard to the validity of the reasons he might give for it. In the present case, no appraisers are named, but each party is to act in their selection. If, then, one set of appraisers fail to agree, or if they act in such a manner as to render them obviously unfit to decide the matter, another appoint-

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ment should be made; and a fair interpretation of the contract requires the lessee to use all reasonable efforts in his power in order to obtain suitable appraisers who will agree. He must continue to act till he puts the lessor in the wrong, or else makes it manifest that no suitable persons, can be obtained to do the service within a reasonable time, which can hardly be supposed.

Whether the plaintiff has thus fulfilled the contract on his part, is a question of fact for the jury; and the court are of opinion that the evidence offered by the defendant is material on this point. If he has fulfilled the contract, he is entitled to recover the value of the buildings, to be assessed by the jury, or by an assessor if the parties so agree. If he has failed to fulfill it, he is not entitled to maintain this action, but must proceed according to his contract, and make all reasonable efforts to procure an appraisement, which is all that a reasonable construction of his contract requires of him as preliminary to bringing an action for the price.

The question whether an arbitration clause in a contract is valid has often arisen, and in some of its aspects presents great difficulties. But the present case comes within the principle stated by COLERIDGE, J., in *Avery v. Scott*, 8 Exch. 500, that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damage, or the time of paying it, or any matters of that kind that do not go to the root of the action. See also *Elliott v. Royal Exchange Assurance Co.*, Law R. 2 Exch. 243. There is no policy in the law in this commonwealth adverse to the settlement of controversies or questions between parties by arbitration; and contracts to that effect are enforced so far as they can be consistently with the principles of law. Judicial tribunals are provided by the government to enable parties to enforce their rights when other means fail, but not to hinder them from adjusting their differences themselves, or by agents of their own selection. In cases like that of *Rowe v. Williams*, 97 Mass. 163, there being no condition precedent to the right of recovery, a mere agreement to refer, which either party may revoke before the arbitrators execute the power, is not a bar to an action, and does not oust the court of its jurisdiction.

New trial ordered.

STODDARD and ano., executors, v. HARRINGTON.

(100 Mass. 87.)

State insolvent laws. When discharge a bar.

Where a contract is made between two citizens of the same state, within the state, and one of them afterward removes therefrom and becomes a citizen of another state, and the other then obtains a discharge under the provisions of an insolvent law of the state where the contract was made, which was enacted and in force before the date of the contract, such discharge is a bar to a suit upon the contract.

Contract on a promissory note made by the defendant, dated Worcester, February 17th, 1852, and payable to the order of the plaintiff's testator. The following are the agreed facts: The note was made in Massachusetts, and was for a debt there contracted. At the time of the contracting of the debt and of the making of the note, the maker and payee were both citizens of Massachusetts, and the maker has since so continued. In 1854 the payee became a resident of South Carolina, and so continued until 1863, when he returned to Massachusetts, and there continued till his death in 1865. His executors—the plaintiffs—were residents of Massachusetts. In 1859 the maker received a certificate of discharge in proceedings in insolvency under the Massachusetts law. The note in question was not offered for proof against the estate in such proceedings. This action was commenced in 1868.

J. Green, Jr., for plaintiff.

T. L. Nelson, for defendant.

HOAR, J. The precise question which this case presents does not seem to have been decided by the supreme court of the United States. That question is, whether, if a contract is made between two citizens of the same state within the state, and one of them afterward removes therefrom and becomes a citizen of another state, and the other then obtains a discharge under the provisions of an insolvent law of the state where the contract was made, which was enacted and in force before the date of the contract, such a discharge is effectual as a bar to a suit upon the contract. It has been held to be a bar in this commonwealth. *Brigham v. Henderson*, 1 Cush. 430;

Stoddard v. Harrington.

Converse v. Bradley, id. 434, *note*. In the first of these cases the contract was both made, and, by its terms, to be performed, in Massachusetts; but in *Converse v. Bradley* it only appears to have been a promissory note, made within the commonwealth, no place of payment being designated. The latter case is, therefore, a direct authority in point.

The decision in *Scribner v. Fisher*, 2 Gray, 43, that a discharge under the insolvent law of Massachusetts is valid against a creditor who was a citizen of another state at the time the contract was made, if it was, by its express terms, to be performed in this commonwealth, has been overruled by the supreme court of the United States in *Baldwin v. Hale*, 1 Wall. 223; and the subsequent action of this court has conformed to the doctrine of *Baldwin v. Hale*. *Kelley v. Drury*, 9 Allen, 27. But the opinion in *Baldwin v. Hale*, does not in any manner advert to the decision in *Brigham v. Henderson*; and Mr. Justice METCALF, who dissented from his associates in *Scribner v. Fisher*, gave the opinion of the court in that case.

Regret has been frequently expressed by judges of the courts of the United States, as well as by those of the several states, that with all the learning and ability which have been bestowed upon the discussion, it has not been found practicable to place the decisions on this important subject upon some clear and intelligible basis of principle. But the reasons given by different judges for coming to the same conclusions have been so diverse, and the grounds assigned for judgments not certainly repugnant to each other have been sometimes so apparently inconsistent, that it is difficult to do more than follow adjudged cases in their literal application, without attempting to gather from them a rule which will afford a sure solution of new questions.

It is settled that a state insolvent law is constitutional, which applies to contracts made after its enactment, within the state, and not to be performed elsewhere, if made between citizens of the state, who continue citizens at the time a discharge is obtained, and at the time the action is brought upon the contract. If the contract is made between citizens of the state, it has been held, in *Brigham v. Henderson* and *Converse v. Bradley*, that the power to grant a discharge is not impaired by a subsequent removal of the creditor to another state. Nothing inconsistent with these decisions has been decided by the supreme court of the United States. We, therefore, feel bound to adhere to them, being satisfied that a preponderance of opinion in

the discussion of cases which have so far arisen in the national tribunals is in their favor, and that they are correct in principle.

The suggestion that the power of a state over the contracts of its citizens is limited by the power to make them parties to the proceedings in insolvency does not seem to us well founded, because we think that the effect of the insolvent law qualifies the contract from its inception; and the question of the sufficiency of the notice to creditors to make them so far parties as to be bound by these proceedings does not seem to be one over which the courts of the United States have any peculiar jurisdiction.

Judgment for the defendant.

BLAIR V. FOREHAND.

HUTCHINSON V. SAME.

SMITH V. SAME.

(100 Mass. 122.)

Police power of the legislature. The regulation of the keeping of dogs.

The regulation of the keeping of dogs, and the authorization of their summary destruction when prescribed regulations are not complied with, are within the police power of the legislature.

When necessary to insure the public safety, the legislature may, under the police power vested in it, authorize municipal authorities to summarily destroy property without legal process or previous notice to the owner.

An officer having a warrant from the proper authorities directing him to kill all dogs not "licensed and collared," as required by statute, which statute provides that such dogs may be killed "whenever and wherever found," has a right peaceably to enter for that purpose, without permission, upon the close of the owner or keeper of such a dog, and there kill it.

An officer who, under authority of law, kills a dog within the owner's close, and then leaves the body with the collar still on, is not liable for a conversion of the collar.

Each of the declarations in these actions contained two counts, one in the nature of trover for a dog and dog collar, and the other of trespass for breaking and entering a close and taking away a dog and dog collar, and killing the dog.

The defense was that the defendant was a constable of Grafton;

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that, as such, he had received a warrant from the selectmen of that town requiring him to kill all dogs not duly licensed and collared, according to the provisions of statute of 1867, c. 130; that the acts complained of were done under that statute, and that the dogs killed were not duly licensed and collared.

The agreed facts show that the defendant entered the close of each of the plaintiffs; that in Blair's case he did not enter the house, nor touch the dog, until after he had shot it, when he carried it back to the place within the close, where he had first found it. In Hutchinson's case he reached his hand into the open shed, in which the dog was tied, led the dog out by the rope attached to its collar, and killed it. In Smith's case he entered the house through the open door, unopposed, and followed by the dog; exhibited his warrant, and then took the dog from the house to the yard, and there killed it. Each of the dogs had on a collar at the time of the killing, and the bodies of each, with the collar still on, were left within the close when shot.

J. Hopkins, for plaintiffs:

The warrant under which the defendant justifies, not being founded on oath, nor containing any special designation of the objects of seizure, or the owners thereof, and directing the seizure or destruction of property without previous judicial condemnation, was contrary to the declaration of rights, and undertook to deprive citizens of property otherwise than by the judgment of their peers or the law of the land. The taking and use of the collars, as shown by the facts, were a conversion. *Wheelock v. Wheelwright*, 5 Mass. 104; *Prescott v. Wright*, 6 id. 20; *Nelson v. Merriam*, 4 Pick. 249; *Thurston v. Blanchard*, 22 id. 18; *Colby v. Jackson*, 12 N. H. 526. The entering and killing of the dogs in the close was a trespass. *Kerr v. Seaver*, 11 Allen, 151; *Bishop v. Fahay*, 15 Gray, 61.

H. B. Staples, for defendant.

GRAY, J. All rights of property are held subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the constitution of the commonwealth, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare. In the exercise of this power the legislature may not only provide that certain kinds of property (either abso-

the question of misrepresentation and fraudulent substitution was not open, because the demandant had not returned or offered to return the consideration paid and received for the deed.

So far as the action is prosecuted for the recovery of the two parcels of land agreed to be sold, this is undoubtedly the rule of law. The general rule that a party who seeks to rescind a contract must restore the consideration received, or put the other party in *statu quo*, applies as well to a rescission on the ground of misrepresentation and fraud as to other cases. *Kimball v. Cunningham*, 4 Mass. 502; *Thurston v. Blanchard*, 22 Pick. 18; *Perley v. Balch*, 23 id. 283; *Thayer v. Turner*, 8 Met. 550; *Masson v. Bovet*, 1 Denio, 74. The exceptions grew out of and are founded on the deficient capacity of the party who seeks to be relieved from the contract. *Gibson v. Soper*, 6 Gray, 279; *Chandler v. Simmons*, 97 Mass. 508. In *Bartlett v. Cowles*, 15 Gray, 445, the general rule is said, by the learned judge who gave the opinion, to apply to the case of infants seeking to avoid their executed contracts on the ground of infancy. And some color of authority is given for that opinion by two or three of the citations made in its support. But the weight of argument, and we think also of authority, is the other way. See *Price v. Furman*, 27 Verm. 268. The case of *Bartlett v. Cowles* did not require any decision of that question. It was entirely sufficient for the decision of the case, that the cutting and sale of the timber by the defendant had been done under an agreement, which, at the time, was an existing valid contract. The subsequent avoidance of the contract under which it had been done could not convert those acts of the defendant into a tort. This consideration removes the statement of the rule above referred to into the class of *obiter dicta*; and we think it is contrary to the whole theory of the laws of infancy. The question was directly raised in the more recent case of *Chandler v. Simmons*, and this court are unanimously of the opinion there expressed.

As to the parcels of land not sold, but alleged to have been included in the deed by fraud of the defendant, the case stands differently. In a writ of entry the demandant may recover any part of the premises demanded, though less than the whole. Gen. Stats. c. 134, § 10. If the plaintiff can establish the facts that those parcels were so included by fraud, and that no part of the consideration was paid and received on account thereof, she may set up the fraud and avoid the conveyance of those lands without rescinding the

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actual sale or setting aside the entire deed. The avoidance applies to the grant of the title, and not to the instrument by which it is made. *Walker v. Swasey*, 2 Allen, 312. The question whether the evidence was sufficient to prove that the conveyance of such other parcels was procured by misrepresentation and fraudulent substitution, or fraudulent insertion in the deed, is not before us. It tended to prove it; but, by the ruling of the court, the jury were precluded from passing upon it. The exceptions must, therefore, be sustained.

PERKINS v. LOCKWOOD and another.

(100 Mass. 342.)

Compromise of Debts.

An agreement by a creditor to accept, in satisfaction and discharge of a liquidated debt, a sum less than the full amount due, provided that no other creditor shall receive more than a like per cent on his claim, is void.

This was an action of contract on a promissory note for the sum of \$159.41, bearing date October 7, 1861, payable to the plaintiff nine months after date, and signed by the defendants, Lockwood & Connell, as copartners. It was indorsed by the plaintiff as follows: "December 14, 1864. Received on the within note \$10.38, being the first installment toward \$15.94, being ten per cent of said note, which, when paid, is to be in full satisfaction and settlement of the within note, provided that no other creditor shall receive more than ten per cent on his claim against Lockwood & Connell, and, provided also, that if any creditor shall receive more than ten per cent an amount equal to such percentage shall be paid on the within note."

There was no evidence of any assignment of property or other security given to the plaintiff; nor that any creditor had been paid more than ten per cent on his claim. The court ruled that the indorsement constituted a valid and legal contract, and the jury found a verdict for the plaintiff for only the balance of the ten per cent and the interest; and the plaintiff alleged exceptions.

E. H. Bennett and *H. J. Fuller*, for plaintiff.

J. M. Morton, Jr., for defendant.

WELLS, J. An agreement to accept in satisfaction and discharge of a liquidated debt a sum less than the full amount due is not valid, unless there exist some consideration to support it, other than the payment or promise of the debtor to pay such less sum. *Harriman v. Harriman*, 12 Gray, 341. The note or collateral promise of another person will support the agreement. *Brooks v. White*, 2 Met. 283. For a like reason, when such an agreement forms part of a composition in which several creditors join, mutually stipulating to withdraw or withhold suits, and that they will release to their common debtor a part of their claims upon payment of a certain other part, the agreement becomes binding between each creditor and the debtor. *Eaton v. Lincoln*, 13 Mass. 424; *Steinman v. Magnus*, 11 East, 390. The reason is, that the rights and interests of other parties become involved in the arrangement, and this affords a new and legal consideration for the promise. It would be contrary to good faith for a creditor who has secured the advantage of such an arrangement to disregard its obligations by proceeding to enforce the balance of his demand; and the debtor is entitled to avail himself of this consideration in defense. *Good v. Cheeseman*, 2 B. & Ad. 328; *Boyd v. Hind*, 1 H. & N. 938.

In this case the exceptions do not show that there was any such mutual agreement between the creditors. The defense indicated by the most important ruling of the court appears to be based entirely upon the legal effect of the agreement between the plaintiff and defendant, as indorsed upon the notes in suit. That agreement affects no other party. Its reference to the like settlement of other debts is merely in the nature of a condition attached to the plaintiff's promise to discharge the notes. It does not make it any the more binding. The defendant's undertaking, that he would not pay others more than the plaintiff, would not prevent others from enforcing their claims in full; and is not such a promise as would afford any consideration for the agreement of the plaintiff. It is neither a benefit to the plaintiff nor disadvantage to the defendant. So far as the exceptions show, the release of their claims by the other creditors had no connection with the agreement. The agreement itself shows no legal consideration to give it effect as a contract.

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As we understand the exceptions, the court below ruled that the agreement indorsed upon the notes constituted of itself "a legal and valid contract, binding on the plaintiff." This, we think, was clearly wrong, and for this cause the

Exceptions are sustained.

PARKHURST V. GLOUCESTER MUTUAL FISHING INSURANCE CO.

(100 Mass. 301.)

Insurance. Barratry.

A policy of insurance against all marine risks is just as binding and effectual as if the risks are specified in detail.

Those risks include barratry of the master and mariners; and it is immaterial that the assured was the owner of the vessel and appointed the master and mariners.

The facts appear in the opinion.

R. H. Dana, Jr., and L. S. Dabney, for plaintiff.

L. H. Sweetser and C. P. Thompson, for defendants.

GRAY, J. This is an action upon a policy of insurance, by which the Gloucester Mutual Fishing Insurance Company "cause David Parkhurst, for whom it may concern, to be insured, lost or not lost," a certain sum for one year on seven-eighths of the schooner James Sayward, "to be insured in the manner prescribed by the by-laws, to be subject to all the restraints and liabilities therein set forth." The extracts from the by-laws, which are printed on the third page of the policy, show that it is intended to insure a fishing vessel on a fishing voyage; but neither the policy nor the by-laws contain any particular enumeration of the risks to be assumed by the underwriters. On the face of the policy is printed this clause: "And the insurers are not in any case to be held to pay for any loss or damage in consequence of restraint, seizure or detention, by any legal or illegal power whatsoever, or for any damage, accident or loss which may happen or occur to any vessel while she may be under such restraint, detention or seizure." The amount of premium is stated in the margin.

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At the trial it appeared that the vessel was lost in returning from a fishing voyage, within the terms of the policy. There was conflicting evidence upon the question whether she accidentally struck upon a rock, or was scuttled and sunk by the master. The jury found that she was lost by barratry of the master. The only question reserved is, whether, by this policy, as applied to the facts, the plaintiff was insured against such a loss; and, according to our opinion upon that question, judgment is to be entered for the plaintiff or the defendants.

It is, doubtless, necessary that a policy of insurance, read in the light of those facts of which courts must take judicial notice, or which are within the common knowledge of mankind, should express the risks assumed by the underwriters. But such expression may as well be by general terms as by the usual mode of particular enumeration. A policy of insurance against all marine risks, or against all the risks which underwriters usually take, is just as binding and effectual as if the risks are specified in detail. As Chief Justice MARSHALL said in *Yeaton v. Fry*, 5 Cranch, 335, 342, "policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed, in order to effect the real intention of the parties, if that intention can be clearly ascertained." In that case a recovery was had upon a policy "against all risks, blockaded ports, and Hispaniola excepted." And in *Levy v. Merrill*, 4 Greenl. 180, an insurance against "the risks contained in all regular policies of insurance" was held to cover a loss by capture. Even a mere agreement to insure a certain sum on a certain vessel at a certain valuation for a certain voyage is sufficient to bind the insurers to make out a policy in the usual form and containing the usual clauses. *Oliver v. Mutual Commercial Insurance Co.*, 2 Curtis C. C. 290, 291.

The policy before us declares that the defendants cause the plaintiff to be insured a certain sum on a definite interest in a sea-going vessel, "lost, or not lost." The contract is in terms a policy of insurance, and of marine insurance, which as much is to say, a policy of insurance against the usual marine risks.

Those risks, according to the common and almost universal enumeration in English and American policies of insurance, include not only perils of the seas, fire, enemies, pirates, thieves, arrests, restraints and detentions of kings, princes and people, but barratry of the

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master and mariners. A substantially similar form, expressed in almost the same words, has been used in England for more than two centuries. 1 West's Simboleography, § 663; Malynes, 108. In *Jeferies v. Legendra*, decided in the second or third year of William and Mary, the policy in which is described in Carth. 216, and 3 Lev. 320, as "in the usual form," and in 2 Salk. 443, as against "perils of the sea, pirates, enemies," etc., Lord HOLT remarked, by way of illustration "Suppose the master had committed barratry, the insurers are liable." 1 Show. 326; S. C. Holt, 466. Many English cases of insurance against barratry, decided before the American Revolution, are collected in the fifth chapter of Mr. Justice Park's Treatise, and in *Eurle v. Rowcroft*, 8 East, 134, Lord ELLENBOROUGH said "Barratry has, from the earliest times, held its place as a subject of indemnity in British policies of insurance."

By Vaucher's Guide to Marine Insurances, published in London in 1834, and "containing the policies of the principal commercial towns in the world," it appears that "barratry of the master and mariners" is one of the risks specified in the ordinary form of policy, not only throughout the British dominions and the United States but in France (limited in the port of Marseilles to French vessels), Germany and the North of Europe, and that the only ports in which it is omitted are those of Italy, Spain and Portugal, and Alexandria.

In France, in early times, a specific enumeration of risks was not an essential part of the policy, and insurers were responsible *ipso jure* for barratry. Cleirac, Emerigon and other jurists were of opinion that, upon general principles, insurers were so liable, if not discharged by some particular enactment, such as the French Ordinance of 1681, which provided that they should not be responsible for loss or damage to vessels and goods by the fault of masters and mariners, unless expressly charged in the policy with the barratry of the master. Other commentators were of opinion that insurers could not be held liable for barratry, without an express stipulation to that effect. Guidon, ch. 1, art. 1; ch. 2, art. 1; ch. 5, art. 6; ch. 9, art. 1; ch. 17, art. 1; Cleirac, 217, 231, 254, 290, 291, 329, 451; Emerigon des Assurances, ch. 2, § 7; ch. 12, §§ 3, 7, and authorities cited; 2 Valin, 79, 80. But it would be superfluous to enter upon a critical examination and comparison of their conflicting statements, and of the local laws and usages by which they were more or less influenced. It is sufficient for this case that barratry is, and long has been, a usual marine risk wherever our law prevails.

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In *Waters v. Merchants' Louisville Insurance Co.*, 11 Pet. 213, decided for the defendants, the policy which was held not to cover a loss by barratry impliedly excluded that risk, by enumerating the risks assumed as those of "rivers, fire, enemies, pirates, assailing thieves, and all other losses and misfortunes which shall come to the hurt or detriment of the steamboat, her engines, tackle and furniture, according to the true intent and meaning of the policy." Even in that case, a loss by fire arising from negligence of the master and crew, was held to be within the policy; and the court cited with approval the words of Mr. Justice BAYLEY, in delivering the opinion of the court of queen's bench, holding that insurers against fire and barratry were not exempt from loss by fire occasioned by such negligence. "The object of the assured certainly was to protect himself against all the risks incident to a marine adventure. The underwriter being, therefore, liable *prima facie* by the express terms of the policy, it lies upon him to discharge himself." *Busk v. Royal Exchange Assurance Co.*, 2 B. & Ald. 73, 79. This view of the contract is equally applicable to the present case.

It was argued by the learned counsel for the defendants that the express exemption of liability for losses by arrest, restraint or detention, tends to show the extent of the liability out of which an exception is made; and that such risks are perils of the sea, and, therefore, the only risks insured against are other perils of the sea. But it is well settled that the risks thus excepted are not perils of the sea. 3 Kent's Com. (6th ed.) 216; *Spence v. Chodwick*, 10 Q. B. 517; *The Griffin*, 4 Blatchf. C. C. 203; S. C. *nom. Howland v. Greenway*, 22 How. 502; *Gage v. Tirrell*, 9 Allen, 307, 310. This argument, therefore, turns with increased force against the defendants.

It was further argued that, if the defendants were liable for barratry at all, they were not so liable in this case, because the assured was the owner of the vessel, and as such had the appointment of the master and mariners, and was responsible for their acts. The report does not show the fact of the ownership of the vessel; but, assuming it to be as stated, we are of opinion that it is immaterial. Some of the continental writers, indeed, have expressed the opinion that insurers against barratry were not liable under such circumstances. But the law of England and America recognizes no such implied exception. *Havelock v. Hancill*, 3 T. R. 277; *Wilson v. General Mutual Insurance Co.*, 12 Cush. 362; and the general

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tendency of the modern decisions is, not to hold the owner, who has complied with the warranty of seaworthiness, responsible for the negligence of master or crew upon the voyage. *Nelson v. Suffolk Insurance Co.*, 8 Cush. 496, and cases cited.

It was argued that such an exception should be implied in this contract, because the Boston policies contain in the clause of bar-ratry an express exception, "unless the assured is owner of the vessel." But no evidence had been offered of any usage to insert such an exception in the port of Gloucester, or any other port in the Commonwealth; and such a usage is not to be inferred without clear proof. *Macy v. Whaling Insurance Co.*, 9 Met. 365, 366; *Rogers v. Mechanics' Insurance Co.*, 1 Story, 603. Even an express exception in a policy is to be construed against the underwriters, by whom the policy is framed, and for whose benefit the exception is introduced. *Palmer v. Warren Insurance Co.*, 1 Story, 364; *Dole v. New England Insurance Co.*, 6 Allen, 385. This rule of construction applies more strongly when an exception from the ordinary marine risks is sought to be implied without any words to support it.

The court is therefore of opinion that, upon the case reported, there must be

Judgment for the plaintiff.

HAYNES v. NICE.

(100 Mass. 397.)

Severance of contract. Application of payments.

The promise to pay for both past and future board at a certain rate is severable, and the plaintiff may recover for so much of it as is not within the statute. A creditor receiving payments without any direction as to application, may appropriate them to any debt not illegal, even if it would not support an action.

There being due from one Hannah Hurley, for her child's board, to the plaintiff, the sum of \$67, the defendant made a verbal promise to pay for such board, both for the time that had elapsed since the child's birth and for that to come, the sum of \$3 per week. He

paid at the time \$13, and subsequently \$25. This action was brought to recover for board of child from time of birth.

J. C. Sanborn, for defendant.

E. J. Sherman, for plaintiff.

GRAY, J. The evidence introduced by the plaintiff at the trial tended to prove that the defendant made an oral promise to pay for the past and future board of the child at a certain weekly rate. The judge presiding at the trial instructed the jury that, if the defendant made such a contract, he would be liable for the future board of the child, but not for the past board, because the contract to pay for that was a promise to pay the debt of another, and within the statute of frauds. The latter part of this instruction was in the defendant's favor and is not excepted to. And he has no just ground of exception to the first part; for the promise to pay for both past and future board at a certain rate was clearly severable, and the plaintiff, under a general count (such as this declaration contains), might recover for so much as was not within the statute. *Rand v Mather*, 11 Cush. 1; *Allen v. Leonard*, 16 Gray, 202.

The instruction as to the appropriation of payments was equally correct. A creditor, receiving payments from his debtor without any direction as to their application, may appropriate them to any debt which he holds against him, and which is not illegal, even if it would not support an action, either because the law, without prohibiting the contracting of such a debt, has declared that no action shall be maintained upon it, or because a right of action once existing has been barred. *Philpott v. Jones*, 4 Nev. & Man. 14; S. C. 2 Ad. & El. 41; *Rohan v. Hanson*, 11 Cush. 47; *Mills v. Fowkes*, 5 Bing. N. C. 455; S. C., 7 Scott, 444; *Ramsay v. Warner*, 97 Mass. 13. The statute of frauds does not make an oral promise to pay the debt of another unlawful, or prohibit its performance, but only prevents the maintenance of an action upon it. This plaintiff was allowed to maintain her action upon so much only of the defendant's contract as was not within the statute.

Exceptions overruled.

ADAMS V. ADAMS.

(100 Mass. 365.)

Writ of supplicavit.

Origin and character of the writ of *supplicavit* stated.

Courts of equity will not entertain a petition for such writ where the party applying therefor has grounds for a divorce *a mens* because of ill-treatment, although she has conscientious scruples against applying for a divorce.

The petition was for a writ of *supplicavit* on ground of cruel treatment of and neglect to maintain the petitioner by the respondent, her husband. The petitioner further stated that she "does not find liberty of conscience, and with her religious convictions, to avail herself of the statute remedy of divorce to obtain alimony." An injunction to restrain respondent from concealing or wasting his substance was also asked.

A. G. Sedgwick, for petitioner, cited *Dobbyn's Case*, 3 Ves. & B. 183; *Fitzherbert*, N. B. 80 E, 81 B, 82; *Ball v. Montgomery*, 2 Ves. Jr. 195; *Duncan v. Duncan*, 19 Ves. 394; 2 Story's Eq. (8th ed.) § 1476, note 3; 2 Com. Dig. Ch. 2 D; 1 Eq. Cas. Ab. 67; *Lambert v. Lambert*, 2 Bro. P. C. 26; *Codd v. Codd*, 2 Johns. Ch. 141; *Prather v. Prather*, 4 Desaus. 33; *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Patterson v. Patterson*, 1 Halst. Ch. 389; *Glover v. Glover*, 16 Ala. 440; *Dunnock v. Dunnock*, 3 Md. Ch. 140; *Thompson v. Thompson*, 10 Rich. Eq. 416; *Simpson v. Simpson*, 31 Mo. 24; *Almond v. Almond*, 4 Rand. 662; *Lockridge v. Lockridge*, 3 Dana, 28; *Oxenden v. Oxenden*, 2 Vern. 393; *Williams v. Callow*, id. 752; *Lambert v. Lambert*, 2 Bro. P. C. 18; *Rice v. Hale*, 5 Cush. 238.

A. R. Brown and *A. E. Alger*, for respondent.

CHAPMAN, C. J. This is a petition for a writ of *supplicavit*, addressed to us as a court of chancery. The petitioner alleges and proves such acts as would be sufficient to support a libel for divorce from bed and board for his cruel and abusive treatment of her. She also alleges and proves that she has conscientious scruples against applying for a divorce. No writ of *supplicavit* has ever issued from this court. The novelty of the application makes it necessary to examine into the origin and character of the process. A full account of

it is given in Fitzherbert, N. B. 79. It appears that it was a writ *de securitate pacis*. It might be sued out by any person, upon proper petition and oath, requiring another, who had threatened him, to keep the peace. A wife might have it against her husband. But after the St. 1 Edw. III, ch. 16, other forms of writ were resorted to. Upon security being given by the defendant, he might have a *supersedeas*.

The form of the writ was, to compel the husband, "that he shall well and honestly treat and govern the aforesaid B. (his wife), and that he shall not do, nor procure to be done, any damage or evil to her of her body, otherwise than what reasonably belongs to her husband for the purpose of the government and chastisement of his wife lawfully." See also Bac. Ab., Surety of the Peace, C. The course of proceeding was, to arrest the defendant on the writ and bring him before the sheriff, or a justice of the peace, when a recognizance was taken in a reasonable sum, with sureties, and thereupon he was discharged by a writ of *supersedeas*. If nothing new appeared, it was the practice, both in chancery and in the king's bench, to discharge the articles of the peace at the end of a year. *Baynum v. Baynum*, Ambl. 63; *Ex parte King*, id. 240. But if the ill usage continued, a discharge was refused. *Ex parte King*, id. 333. The court had only power to bind the husband to his behavior, not to remove his wife from him. *The King v. Lord Lee*, 2 Lev. 128. There are several reported cases in modern times where sureties of the peace were required. *Tunnichliff's Case*, 1 Jac. & Walk. 348; *Heyn's Case*, 2 Ves. & B. 182; *Dobbyn's Case*, 3 Ves. & B. 183.

The object of the writ is not to provide for a permanent maintenance for the wife. In *Head v. Head*, 3 Atk. 547, Lord HARDWICKE said the security was taken upon the supposition that the parties would live together. In *Duncan v. Duncan*, 19 Ves. 394, Sir WILLIAM GRANT said it was contrary to the established doctrine, that a married woman should be a plaintiff in the court of chancery for a separate maintenance; that it was always incidental to some other matter that she became entitled to a separate provision. He instances the case of a *supplicavit* for sureties of the peace, if it became necessary that she should live apart. See also *Ball v. Montgomery*, 2 Ves. Jr. 195. But it is not stated that the provision is to be permanent; and the remarks are mere *dicta*. But in *Clancy or Married Women*, 454, it is said that the writ is always sued

upon the supposition that the husband and wife are to cohabit, as will appear from the language and object of the writ itself; and he asks: "How can a court award a separate maintenance to a wife upon a proceeding which she has recourse to upon the idea that she is to live with her husband?" In *Codd v. Codd*, 2 Johns. Ch. 141, Chancellor KENT doubted his power to grant the writ, even in a proper case, and asked why the party should not apply to a justice of the peace to bind the other to his good behavior. The only cases cited in which it appears to have been granted in this country is *Prather v. Prather*, 4 Dessaus. 33.

In 2 Story's Eq. (8th ed.) § 1423, it is said that there is no modern instance of a decree of separate maintenance on *supplicavit*. No such instance is referred to in the argument in this case, nor have we been able to find one.

In *Clavering's Case*, 2 P. W. 202, a motion for *supplicavit* was refused, and it is remarked that the master of the rolls generally refuses to grant this writ, directing the party to apply elsewhere, namely, to the justices of the peace.

In its nature, it is a criminal proceeding; and this is a good reason why it should have gone into disuse, for it does not seem to be desirable that courts of chancery should retain this small modicum of criminal jurisdiction. The provisions of the General Statutes, chapter 113, which prescribe chancery jurisdiction and regulate chancery practice in this commonwealth, render it clear that the legislature did not intend to include criminal cases. And chapter 169, which regulates the process by which parties may be required to give sureties to keep the peace, limits the term of the recognizance to six months. This limitation would substantially destroy the value of a writ of *supplicavit*; and though the statute authorizes this court, as well as the inferior courts, to take such recognizances, yet it is to be so interpreted as to be consistent with the system of leaving all criminal matters, except capital cases, to be tried in the lower courts.

But it never was as a direct object of the writ of *supplicavit* to give alimony. Its purpose was to protect the complaining party from personal violence and abuse. Sometimes it was thought necessary to make a temporary provision for a wife who had left her husband, because it was not safe to live with him until he would receive her back. An attempt to use the process for the direct purpose of obtaining alimony to enable her to have a permanent separate maintenance would have been regarded as an abuse.

Yet, the obvious purpose of the complaint in this case, is, to make this court an instrument by which a woman, who has ground for a divorce *a mensâ* because of ill-treatment, may obtain a permanent separate maintenance, and still preserve the marriage relation. The petition enumerates the acts of abuse, avers that the petitioner has asked her husband for money and maintenance for herself and child, which he refuses to furnish, and avers that it is dangerous to her life to live with him. It alleges that he is concealing and wasting his property, and that she and her child are in danger of being left without support. It prays that he may be required to find sureties of the peace, and that, as incident thereto, there shall be granted to her, from his property or earnings, a suitable maintenance for herself and child, and that a writ of injunction may be granted, restraining him from conveying or concealing his property.

It alleges that she has left him, but does not intimate a willingness or desire to return. Of course the only use of a recognizance to keep the peace would be to prevent him from molesting her while living separately. The form of the ancient writ for which she asks would hardly be approved of by her or by the court.

But she puts her case upon the ground that she has conscientious scruples against the remedy which is provided by law for married women who desire to be permanently separated from their husbands, namely, an application for a divorce. Such scruples may always justify a party in declining to avail herself of any legal remedy which the law has provided; or in applying to the legislature to establish a new remedy by statute. But the judicial department of the government has not power to make law; it can only declare what the law is, in application to cases as they are properly brought before it. We could not, for example, give to a party a remedy in equity on the ground that he had conscientious scruples against bringing an action of tort. For this reason, we cannot take notice of the conscientious scruples of the petitioner in respect to any remedy which the legislature has provided for her.

Petition dismissed.

SHAW V. SPENCER *et al.*

(100 Mass. 382.)

Transfer of stock certificates. Pledge of trust property.

A certificate of stock transferred in blank is not a negotiable instrument.

Where one known to be a trustee, pledges that which is known to be trust property, to secure his own debt, the act is *prima facie* unauthorized, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it.

Where one holding certificates of stock in his name as "trustee," pledges the same as security for his own debt, the term "trustee" is a sufficient notice of a trust, and the pledgee who takes the certificates without inquiry, does so at his peril.

Evidence that stock certificates, issued in the name of one as trustee, and by him transferred in blank, are constantly bought and sold in the market without inquiry, is inadmissible, as varying an established rule of law.

The owner of stock certificates, fraudulently pledged by one holding them as trustee, is not estopped from claiming them of the pledgee by standing by, after having notified the pledgee of his claim and demanding the stock, and without protest, witnessing the pledgee pay an assessment theretofore made on the stock.

Bill for an injunction to restrain Spencer, Vila & Co., a firm of brokers, from making any sale or transfer of two thousand shares of the stock of the Calumet Mining Company, or of the certificates thereof, and also the said company from recognizing the validity of any such sale or transfer otherwise than to the plaintiff.

The following were the facts: Charles Mellen, a member of the firm of Mellen, Ward & Co., as collateral security for an antecedent debt due from that firm to Spencer, Vila & Co., had delivered to them two certificates of stock in the Calumet Mining Company for one thousand shares each, standing in the name of another member of the firm of Mellen, Ward & Co., namely, "E. Carter, trustee," and by him transferred in blank. These certificates contained the following provision: "Transferable only on the books of the company by the holders thereof in person, or by a conveyance in writing recorded in said books, and surrender of this certificate."

The shares represented by these certificates were originally owned by Q. A. Shaw, had been transferred by him to the plaintiff, S. P. Shaw, and by him transferred into the name of "E. Carter, trustee," as collateral security for acceptance of Q. A. Shaw, on drafts of the

Huron Mining Company, which had been taken by Carter's firm, Mellen, Ward & Co., for negotiation. The receipt given by Mellen, Ward & Co. for these certificates acknowledged them as collateral security, and promised to return them to S. P. Shaw, the plaintiff, whenever said acceptances were paid. The books of the company did not show the arrangement with Carter, nor the nature or extent of the trust. At the time of the delivery of the certificates to the defendants, Spencer, Vila & Co., nothing was due Mellen, Ward & Co. on the Shaw acceptances.

The firm of Mellen, Ward & Co. having failed, without paying their debt to Spencer, Vila & Co., the latter firm filled the blanks in the transfer of the certificate with their own name, and presented them to Q. A. Shaw, the transfer agent of the mining company, and requested that the transfer be made and a new certificate issued in the name of the firm. Mr. Q. A. Shaw declined to make the transfer on the ground that an assessment of five dollars per share, which had been made on the capital stock, remained unpaid on the shares in question. The next day, having learned of the manner in which Spencer, Vila & Co. had become possessed of the certificates, Mr. Q. A. Shaw served a notice on that firm that the said certificates were his property, and requested them to hold the same subject to his orders. This notice was signed by him "for self and other trustees." Afterward, Spencer, Vila & Co. paid at the office of the company, to Mr. Q. A. Shaw, who had become treasurer, and in the presence of the plaintiff, who was then president, the assessment due on the shares, which was received, and no demand made for the stock. On the next day the treasurer returned the amount paid on the assessment, with a notice signed as before, that the payment was made and received by mistake, and that the stock was owned by himself. The defendants refused to receive the amount so returned. The plaintiff then served notice on the defendants that the stock belonged to him, and requested them to deliver the certificates to him, with such indorsements as would enable him to obtain it, and the request being denied, filed this bill.

The defendants offered testimony to show: "1. That it is usual with dealers in the stock market to deliver, by way of sales or pledge, certificates of stock, with a blank transfer upon the back. 2. That it is usual for holders of certificates of stocks, transferred in blank, to fill them up by inserting the name of some person as transferee or purchaser. 3. That it is a matter of common occurrence for cer-

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tificates of stock to be issued in the name of some other person as trustee, when, in fact, there is not any trust. 4. Whether certificates of stock, issued to a designated person as trustee, are constantly bought and sold in the stock market by a simple indorsement of the certificate by the person named as the holder, without inquiring as to the authority by which, or to the use or purpose for which, the transfer was made." But the judge ruled that, "as to the first two propositions, the facts proposed to be shown were immaterial; and, as to the last two, by the rules of law they were inadmissible."

The defendants excepted, and the judge reported the case for decision thereon.

S. Bartlett and F. Bartlett, for plaintiff.

B. R. Curtis, C. B. Goodrich and J. M. Keith, for defendants.

We give only a brief outline of the argument.

1. The doctrine of constructive notice should be applied with caution; per Lord COTTENHAM, in *Jones v. Smith*, 1 Phil. Ch. 253; Lord CRANWORTH, in *Ware v. Egmont*, 4 De. G., McN. & Gord. 460; *McMechan v. Griffing*, 3 Pick. 149; *Buttrick v. Holden*, 13 Met. 355; *Ashton v. Atlantic Bank*, 3 Allen, 219.

2. Whether the doctrine of constructive notice will be applied depends on the peculiar facts of each case. 2 Sugden on Vendors (7th Am. ed.), 1041; Dewey, J., 3 Allen, 222.

3. When it depends on extrinsic facts whether the fact of which a party has notice does or does not affect the validity of the proposed title, and the party purchases without gross negligence, he is in the sense of the equity law a *bona fide* purchaser without notice. 2 Sugden on Vend. (7th Am. ed.) 1059 and cases cited; Lord ELDON, in *Attorney General v. Backhouse*, 17 Ves. 293; *Boycé's Ex'rs v. Grundy*, 3 Pet. 210; *Buttrick v. Holden*, 13 Met. 355; *Calais Steamboat Co., v. Van Pelt*, 2 Black. 377; *Frazer v. Western*, 1 Barb. Ch. 220.

4. The defendants purchased without gross negligence.

5. The plaintiffs had put it in the power of Carter to deceive the defendants.

6. The plaintiff having stood by while the defendants paid the assessment on the stock, without claiming the stock or denying the defendants title, is estopped.

FOSTER, J. The court have bestowed upon this case a degree of attention commensurate with the importance of the principles on which its decision must depend, and the magnitude of the amount involved. One of two innocent parties must bear a heavy loss, caused by the gross fraud of a third person.

Under the circumstances disclosed by the evidence, it was a flagrant breach of trust and a criminal fraud to transfer the certificates of stock to Spencer, Vila & Co. They were the property of the plaintiff, who is entitled to reclaim them from any one but a *bona fide* holder for value without notice. Charles Mellen, a member of the firm of Mellen, Ward & Co., as collateral security for a debt due from that firm to Spencer, Vila & Co., handed to them two certificates of stock in the Calumet Mining Company for one thousand shares each, standing in the name of another member of that firm, namely, "E. Carter, trustee," and by him transferred in blank. Spencer, Vila & Co. received the certificates thus indorsed in blank with the name of E. Carter, trustee, for a valuable and adequate consideration, without other notice of any defect in title than such as the law may impute from the word "trustee" in the body of the certificates, and after the signature of Carter upon the blank transfers.

It is clear that a certificate of stock, transferred in blank, is not a negotiable instrument. *Sewall v. Boston Water Power Co.*, 4 Allen, 282. Each of these certificates is expressed on its face to be "transferable only on the books of the company by the holder hereof in person, or by a conveyance in writing recorded in said books, and surrender of this certificate." No commercial usage can give to such an instrument the attributes of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the blanks as they were filled in the present instance, so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares. It cannot possibly be material whether the manual delivery of the certificates was by Mellen or by Carter himself. Unless the word "trustee" may be regarded as mere *descriptio personæ*, and rejected as a nullity, there was plain and actual notice of the existence of a trust of some description. A trust as to personalty, or choses in action, need not be expressed in writing, but may be established by parol; and that the mere use of the word "trustee" in the assignment of a mortgage and note imports the existence of a trust, and gives notice thereof to all into whose hands

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the instrument comes, has been expressly decided by this court. *Sturtevant v. Jacques*, 14 Allen, 523. See also *Bancroft v. Consen*, 13 id. 50, and *Trull v. Trull*, id. 407. It is insisted on behalf of the defendants, that, even if there was actual notice of the existence of a trust, there was no notice of its character, and that the trust might have been such as to authorize the transfer which was made by Carter. But, in our opinion, the simple answer to this position is, that where one known to be a trustee is found pledging that which is known to be trust property, to secure a debt due from a firm of which he is a member, the act is one *prima facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. The appropriation of corporate stock, held in trust as collateral security for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond the ordinary scope of a trustee's authority, and out of the common course of business, as to be in itself a suspicious circumstance, imposing upon the creditor the duty of inquiry. This would hardly be controverted in a case where the stock was held by "A. B., trustee for C. D." But the effect of the word "trustee," alone, is the same. It means trustee for some one whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust* than the property of one whose name is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word "trustee," alone, has no meaning or legal effect.

Inasmuch as such an act of pledging property is *prima facie* unlawful, there would be little hardship in imposing upon the party who takes the security, not only the duty of inquiry, but the burden of ascertaining the actual facts at his peril. Where a partner assumes to give for his own private debt the note of his firm, the creditor who takes it must show that it was given with the assent of the other partners, because it is an apparent misuse of the name of the firm, and *prima facie* evidence of fraud. *Eastman v. Cooper*, 15 Pick. 290. But we need not go to that length in deciding the present case. Notice of the existence of a trust is, by all the authorities, held to impose the duty of inquiry as to its character and limitations; and whatever is sufficient to put a person of ordi-

nary prudence upon inquiry, is constructive notice of every thing to which that inquiry might have led.

The objection that in the present case the only persons of whom inquiry could have been made were Mellen and Carter, who committed the breach of trust, is sufficiently answered by the words of Sir JOHN ROMILLY, master of the rolls, in a recent and leading case. "With respect to the argument that it was unnecessary to make any inquiry, because it must have led to no results," he says: "I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones v. Smith*, 1 Hare, 55, that a false answer, or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry; but I think it impossible, beforehand, to come to the conclusion that a false answer would have been given which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, namely, a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say." *Jones v. Williams*, 24 Beav. 62. These remarks also explain the cases, cited by the defendants, of *Butterick v. Holden*, 13 Met. 355, and *Calais Steamboat Co. v. Van Pelt*, 2 Black. 377. In each of these cases the party did make inquiry, and relied upon the answers received, which were of a character calculated to put him off his guard.

If it be asked of whom the defendants could have inquired as to the meaning of the words "E. Carter, trustee," the nature of the trust thereby indicated, and the existence of the power to pledge for the debts of the firm of Mellen, Ward & Co., which Carter was assuming to exercise, the answer is, that the inquiry could have been made of Mellen, and if he replied that he did not know the nature of the trust, then the duty of the defendants would have been to ask Carter himself for an explanation, which it certainly was in his power to give. It is not to be assumed that false answers would have been made, and the defendants have been thereby deceived and misled. On the contrary, the probabilities are that such an investigation would have led to the discovery of the truth. Or, if Spencer, Vila & Co., before taking the stock certificates as collateral security, had been prudent enough to require a transfer to be made to them on the books of the corporation, this step would have brought them into contact with Quincy A. Shaw, and have exposed the whole attempted fraud. Some of the cases say that constructive

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notice is imputed only on the ground of gross negligence. But if it be so, a court of equity must hold it to be a want of ordinary prudence, or *crassa negligentia*, to omit all inquiry, where there is actual notice that a trust of some kind exists, and the use proposed to be made of the trust property is *prima facie* a misappropriation.

The case of *Ashton v. Atlantic Bank*, 3 Allen, 217, is not in conflict with these views. It does not proceed on the ground that there was no duty to inquire, but that upon inquiry and examination of the will creating the trust it would have appeared that the trustee might have the right to use the trust funds as he did. He raised money upon the stocks by a discount of his own note, with them as collateral; and the court said that it might have been incident to his duties "to discount the trust funds for the sake of making a permanent investment," or "the purchaser might reasonably assume that the money was wanted to discharge liability incurred under the will. Such a case was well warranted by the will creating the trust." In short, the court came to the conclusion that the act of the trustee was in itself lawful in that particular case, and that his fraud consisted only in the misuse of the money when obtained. If this was true, of course the purchaser was not bound to see to the application of the purchase-money.

Hutchins v. State Bank, 12 Met. 421, was the case of a sale of shares of bank stock by an executrix. It is the established rule of equity that "purchases from executors of the personal property of their testator are ordinarily valid, notwithstanding it may be affected with some peculiar trust or equity in the hands of the executor; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator, to which they are legally liable before all other claims. But if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside." Smith on Eq. tit. 1 c. iv. 10. "Where an executor disposes of or pledges his testator's assets in payment of, or as security for, a debt of his own, the person to whom they are disposed of or pledged will take them subject to the claims of creditors and legatees." *Elliot v. Merryman*, 1 Lead. Cas. in Eq. 89; *Hill v. Simpson*, 7 Ves. 152. The same doctrine was held by Chancellor KENT, in 1823 in *Field v. Schieffelin*, 7 Johns. Ch. 150; who, upon a review of all the cases down to the time of that decision, thus sums up the result. "The great difficulty has been to determine how far

the purchaser dealt at his peril, when he knew, from the very face of the proceeding, that the executor was applying the assets to his own private purposes as the payment of his own debt. The later and the better doctrine is, that, in such case, he does buy at his peril." Chief Justice GIBSON, in *Petrie v. Clark*, 11 S. & R. 377, expressly announces the doctrine "that an executor's applying the assets in payment of his own debt is of itself a circumstance of suspicion, which ought to put the purchasing creditor upon inquiry as to the propriety of the transaction."

The rule was thus laid down in 1861, in the house of lords: "Where an executor parts with any portion of the assets of the testator, under such circumstances as that the purchaser must be reasonably taken to know that they were sold, not for the benefit of the estate, but for the executor's own benefit, the result is, that the purchaser holds the assets as if he were himself, in respect of those assets, the executor." *Walker v. Taylor*, 4 Law Times (N. S.), 845. See also 2 Redfield on Wills, ch. viii, § 32.

The power of disposition over a testator's assets which an executor has is as extensive as that of a trustee, and the conversion of the testator's personal estate into money is within the ordinary line of an executor's duty. Consequently, the authorities which have been cited as to the liability of those dealing with executors, are fully applicable to the case of one who takes trust property from a trustee as security for his private indebtedness.

We proceed to consider the testimony offered by the defendants, and excluded by the judge at the hearing.

The fact that it is usual for dealers in stock to take certificates with blank transfers upon them, and to fill them up with the names of purchasers, was wholly immaterial. Such a practice, as we have already observed, does not make the shares negotiable; and the purchaser whose name is written into the transfer must always derive his title immediately and solely from the stockholder of record. The point is not made by the plaintiff that, a transfer in blank is out of the usual course of business, or a suspicious circumstance; so that evidence of usage was not requisite to repel such an inference.

The fact that it is common to issue certificates of stock in the name of one as trustee, when no trust actually exists, has no legal bearing on the decision of the present case. The rules of law are presumed to be known by all men, and they must govern themselves

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accordingly. The law holds that the insertion of the word "trustee" after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry, for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question whether the word "trustee," alone, has any significance, and does amount to notice of the existence of a trust. But this has been heretofore decided, and is no longer an open question in this commonwealth. *Sturtevant v. Jacques*, 14 Allen, 523. The circumstance that stock certificates, issued in the name of one as trustee, and by him transferred in blank, are constantly bought and sold in the market without inquiry, is likewise unavailing. A usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts.

It is to be borne in mind that the question under discussion is not whether one holding stock as trustee may sell it in the market and pass a good title to the purchaser. We do not intimate that this cannot be done. The distinction between a sale and a pledge of trust property is palpable and manifest. Nor is the present question whether a trustee may borrow money on the pledge of stock held in trust. We do not decide that such a transaction may not, under some circumstances, be sustained. These questions are left to be adjudged when they arise. The point now decided is, that one holding stock as trustee has *prima facie* no right to pledge it to secure his own debt growing out of an independent transaction; and that whoever takes it as security for such a debt, without inquiry, does so at his peril. All the proffers of evidence taken together fall short of showing any usage to do this; and no evidence of usage could legalize such conduct. Because Spencer, Vila & Co. took these certificates of stock to secure an antecedent debt from Mellen, Ward & Co. to them, with notice that they were held in trust, and made no inquiry as to Carter's authority to use trust property for such a purpose, they cannot retain the security against the equitable owner of the stock, when it appears that Carter, in making the pledge, was guilty of a fraudulent breach of trust.

The remaining questions relate to the effect of the payment, on the 18th of March, of the assessment of ten thousand dollars on this stock by Spencer, Vila & Co. to Q. A. Shaw, treasurer and transfer agent, in the presence of S. P. Shaw, the plaintiff. On the 2d

BARRON *et al.* v. ELDREDGE *et al.*

(100 Mass. 455.)

Common carrier. When liable as warehouseman.

The responsibility of a common carrier for goods commences when there has been a complete delivery for the purpose of immediate transportation. Such delivery is not complete if any thing remains to be done by the shipper before goods can be sent; and if shipment is delayed by his request, the liability is only that of a warehouseman during such delay, and he cannot be charged with the loss of the goods if, while in his custody, he exercised ordinary care.

What constitutes negligence in these cases is a question for the jury.

This action was brought to recover value of flour and grain which was burned while on the premises of the defendants trustees in possession of the Ogdensburgh Railroad, at Ogdensburgh, on July 28, 1864. The flour was in sheds, and the grain in an elevator at some distance from the sheds. The plaintiffs claimed that, at the time of the fire, the defendants were holding the grain and flour as common carriers; the defendants claimed they were holding them as warehousemen only. No separate charge was made for storage by defendants. No question of law having arisen on the evidence, it is not reported. Such necessary facts as are not above stated appear in the opinion.

J. G. Abbott and H. C. Hutchins, for plaintiffs.

G. O. Shattuck and G. Putnam, Jr., for defendants.

COLT, J. The responsibility of a common carrier, for goods intrusted to him, commences when there has been a complete delivery for the purpose of immediate transportation. If, without putting them in transit, the carrier, for his own temporary convenience, places them in store, still the liability of a carrier attaches. The delivery must be for immediate transportation, and, of course, it cannot be complete if any thing remains to be done by the shipper before the goods can be sent on their way. If by the usage and course of business, and especially if by express request, the shipment is delayed for further orders as to their destination, or for the

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convenience of the owner, then, during the time of such delay, the liability is that of warehouseman. The more stringent liability of a common carrier only attaches when the duty of immediate transportation arises. It then shifts from that of warehouseman, although the goods remain unmoved in the storehouse. Whether the responsibility be in one capacity or the other, is seldom a matter of express agreement between the parties. It arises out of the relation which the parties sustain, and the duties which the law imposes. These propositions are elementary, and need no extended citation of cases. Story on Bailm. § 535; 2 Redfield on Railw. (3d ed.) 46; *Judson v. Western Railroad Co.*, 4 Allen, 520. Upon the evidence reported, which, by the consent of parties, is submitted to our decision, and applying the legal principles stated, we cannot find that the defendants are shown to have had possession of the property sued for, or any part of it, as common carriers, at the time of its loss. This is mainly a deduction of fact from all the evidence presented, and it would be unprofitable to state in detail the reasons which influence this result.

The plaintiffs' declaration, in addition to a count charging the defendants as common carriers, contains a count against the defendants upon an undertaking safely to keep the goods in question until they could be transported, alleging that they did not safely keep them, and that, by reason of their carelessness and negligence, they were lost to the plaintiffs. It is conceded, that the liability during this temporary detention is that of warehousemen. It is not necessary that there should be a separate charge for storage. The freight to be ultimately paid as compensation for the whole service, or the delivery for future transportation, furnishes a sufficient consideration for the promise to keep safely, and the defendants became bailees for hire. *Norway Plains Co. v. Boston and Maine Railroad*, 1 Gray, 263. They cannot be charged for the loss if, in the custody of the property, they exercised ordinary care. What constitutes such care is a question of fact to be judged of with reference to all the circumstances of the case. The nature and value of the property, its exposure to damage or loss, its proximity to danger from fire, the means employed to prevent or arrest the progress of fire, the location, character and construction of the storehouse in which it was placed, are elements to be considered. The question of ordinary care is to be settled also in reference to the degree of care which other persons engaged in similar business are in the habit

of bestowing upon property similarly situated. And generally the care and vigilance required is that which men of ordinary prudence, in the same business, usually bestow on property placed in their custody, and similarly situated in its exposure to loss. What constitutes negligence in these cases is a question peculiarly proper for the determination of the jury. And without intending to intimate, without, in fact, forming any opinion as to what the finding of a jury upon these facts ought to be, we are yet of the opinion that, in respect to the flour which was stored in the cross sheds, "there is evidence upon which a jury could find that the defendants were guilty of negligence as warehousemen."

The question of negligence is not confined in this form of action to the condition of the locomotive as to safeguards, or the prudence with which it was driven past the defendants' storehouses. The cases cited by the defendants are mostly those in which the common-law liability of the railroad for property burned off the line, in fires caused by engines, was under discussion, and are not wholly applicable where the defendant sustains the relation of bailee, and his liability as such is sought to be enforced. It is, indeed, true, that negligence cannot be inferred from the simple fact of causing the fire, for the reason that the use of fire to propel a railroad engine is lawful, and sparks and coals may escape, notwithstanding all the safeguards which modern improvement has suggested. But it is matter of common knowledge, that combustible buildings or materials, when near the track, in dry weather especially, are subjected to some degree of increased exposure to fire from passing wood-burning engines, although such engines are provided with ordinary safeguards, and are run with ordinary prudence. The cross-sheds in this case were situated near the track. There is evidence that they were of wood, with wood foundations on the ground, and stood quite near each other. The weather had been dry previous to the fire, and the wind was in a direction to carry the fire from the engine toward the sheds. These circumstances, with others not necessary to allude to, should be submitted to the jury, with proper instructions upon the question whether the defendants were guilty of negligence in the capacity of warehousemen, in their custody of this portion of the property. Assuming that the burden of proof was upon the plaintiffs, under the allegations in their declaration, to show negligence, we think there was some evidence offered which had a tendency to sustain the burden. Story on Bailm. §§ 454, 529. *Cass v.*

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Boston and Lowell Railroad Co., 14 Allen, 448; *Lamb v. Western Railroad Co.*, 7 id. 98.

It does not follow, if the jury should be satisfied, upon all the evidence, that the defendants did not exercise due and proper care in the custody of the flour in the sheds, that the defendants are, therefore, responsible for the loss of the grain which was deposited in the elevator, as a consequence of such negligence. The elevator was built upon a wharf extending into the St. Lawrence, at a distance of some two hundred or two hundred and fifty feet from the buildings which were burned on shore, the intervening space being mostly covered with water. There is no suggestion that it was improperly constructed or insufficiently watched and guarded. The possibility of its destruction by fire, communicated from such a distance, was too remote, according to the usual experience of mankind, to justify a finding, solely upon the evidence afforded by its loss, that, in reference to the property contained in it, the defendants did not exercise due and ordinary care; and, in the opinion of the court, there is no evidence upon which the jury could find that the defendants were guilty of negligence in respect to the elevator and its contents. *McDonald v. Snelling*, 14 Allen, 290.

According to agreement of the parties, the case must stand for trial, on the question of the defendants' liability for the flour only

 McLOON V. COMMERCIAL MUTUAL INSURANCE COMPANY.

(100 Mass. 472.)

Insurance—burden of proof—warranty.

An express warranty in a policy of insurance is a condition precedent, the burden of proving performance of which rests upon the insured.

A warranty "that the vessel be commanded by a captain holding a certificate from the American Shipmasters' Association," means a valid and subsisting certificate.

ACTION of contract upon two policies of insurance, one upon the ship "Young Mechanic," and the other upon her freight on a voyage from Boston to Hong Kong. These policies each contained on the margin the following words: "Warranted by the assured that the

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vessel be commanded by a captain holding a certificate from the American Shipmasters' Association." The other facts sufficiently appear in the opinion.

H. W. Paine and R. D. Smith, for plaintiff.

W. D. Booth and T. W. Clarke, for defendants.

GRAY, J. An express warranty in a policy of insurance is a condition precedent, the burden of proving performance of which rests upon the assured. The nature and form of the warranty may affect the amount of evidence to be required of the plaintiff in the first instance; but whether the terms used are affirmative or negative, the warranty is equally a condition precedent, performance of which must be proved by the plaintiff in order to maintain an action on the policy. The rule has accordingly been applied equally to warranties to sail with convoy or with a certain crew, armament or license, and to warranties not to carry a particular kind of merchandise. 3 Kent's Com. (6th ed.) 288; Marshall on Ins. (5th ed.) 561; 2 Phil. Ins. § 2122; 2 Arnold on Ins. (3d ed.) 1072; *Craig v. United States Insurance Co.*, Pet. C. C. 416; *Campbell v. New England Insurance Co.*, 98 Mass. 390; *McLoon v. Mercantile Mutual Insurance Co.*, 100 Mass. 474, *n.*

The warranty in this case is "that the vessel be commanded by a captain holding a certificate from the American Shipmasters' Association." We concur with the learned counsel for the defendants, that this means a valid and subsisting certificate. But we are of opinion that, upon the facts stated in the report, the master of the "Young Mechanic" held such a certificate at the time of the loss of the vessel in April, 1866. It is admitted that such a certificate was issued to him by the association in due form in December, 1861, certifying that he had "been registered by this association as an approved shipmaster," and subject to "be revoked at any time under the rules of this association, and at its option, either by notice to the holder or by advertisement in the public papers." By a memorandum upon this certificate the holder "is required to present it at this office for indorsement at or before the expiration of one year; if on a voyage, then on return to New York." But the certificate contains no provision that it shall expire by any limitation of time, or failure to comply with its directions, or in any other way except

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by being revoked by the association. It is immaterial whether Captain Grant or the association considered that he held a certificate at the time of the loss; for the only question under the terms of the warranty is whether he actually held one; and a warranty must be strictly complied with according to its terms, whether such strictness operates in favor of the insurers or of the assured. *Forbush v. Western Massachusetts Insurance Co.*, 4 Gray, 340, 341.

Judgment for the plaintiff.

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(100 Mass. 505.)

Common carriers. Receipts from, containing limiting provisions.

A common carrier may, by special contract, avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire occurring without fault on his part.

A receipt, in proper form, delivered to the plaintiff by the defendants as their contract, with the terms and conditions expressed in the body of it in a way not calculated to escape attention, and its acceptance by the plaintiff at the time of the delivery of his package, without notice of dissent, authorized the defendants to infer his assent to the terms.

Numerous cases commented upon and distinguished from the one at bar.

ACTION of contract against the defendants, carrying on business as the Adams Express Co., to recover value of package of money burned at sea.

These facts were agreed upon :

"It is agreed that the plaintiff delivered to the Adams Express Co., as common carriers, at Wilmington, in the state of North Carolina, March 21, 1865, a package containing one hundred and fifty dollars, directed to Patrick Corbett, Taunton, Massachusetts, and the said express company at the same time delivered to the plaintiff a bill of lading, a copy whereof is hereto annexed, and which makes part of this statement; that the said express company shipped said package with other packages from Wilmington by the steamship General Lyon, which ship was accidentally burnt at sea, and said package thereby destroyed. It is further agreed, if evidence of the fact be admissible, that the plaintiff would testify that when the

plaintiff delivered the package and took the bill of lading, a copy of which is annexed, he did not read the same."

The bill of lading was substantially as follows:

"Adams Express Company. Great Eastern, Western and Southern Express Forwarders. \$150. Form 5. Wilmington, March 21, 1865. Received from —, one P., sealed, and said to contain one hundred and fifty dolls. Addressed, Patrick Corbett, Taunton, Mass.

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation — such delivery to terminate all liability of this company for such package; and also, that this company is not to be liable in any manner, or to any extent, for any loss, damage or detention of such package, or of its contents, or of any portion thereof . . . occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam.

For the company,

ROBINSON."

M. Norton, for plaintiff.

H. C. Hutchins, for defendants.

COURT, J. It is to be received as now settled by the current and weight of authority, that a common carrier may, by special contract, avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire, occurring without fault on his part.* It is not necessary to discuss here how far in this or other respects he may escape those liabilities which the policy of the law imposes, by mere notices brought home to the employer or whether the effect of such notices may not be held to vary accord-

* A common carrier cannot secure exemption from losses resulting from his own negligence, or that of his servants, at least without obtaining such exemption by express words. *Grill v. Genl. Iron Screw Co.*, L. R. 3 C. P. 476; *Czech v. Genl. Steam Nav. Co.*, id. 14; *Lemo v. Dudgeon*, id. 17, n; *York Co. v. Central R. R.*, 3 Wall. 107; *Cole v. Goodwin*, 19 Wend. 351; *Gould v. IRL*, 2 Hill, 638; *Lesinsky v. N. J. Central R. R.* (unreported G. T. S. C., 1st dist.); *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 383; *Schieffelin v. Harvey*, 6 Johns. 190; *Alexander v. Greens*, 7 Hill, 533-547; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Wells v. Steam Nav. Co.*, 3 id. 375; *Wells v. N. Y. Central R. R.*, 24 id. 181; *Phillips v. Clark*, 25 L. J. (C. B.) 168, 2d C. B. N. S. 156; *Pan. and Orient. Steam Nav. Co. v. Shand*, 11 Jur. 771; *Lloyd v. Genl. Iron Screw Co.*, 23 L. J. (Ex.) 5 H. L. C. 294; *Martin v. Great Indiana R. R.*, 3 Ex. R. 9; *Pugh v. North Staffordshire R. R.*, 23 L. J. (Q. B.) 241.—*REP.*

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ing as it is attempted to avoid those extraordinary responsibilities which are peculiar to common carriers, or those other liabilities under which they are held in common with all other bailees for hire. *Judson v. Western Railroad Co.*, 6 Allen, 486; *York Co. v. Central Railroad Co.* 3 Wall. 107; *Hooper v. Wells*, 27 Cal. 11; and see article by Redfield, with collection of authorities, 5 Am. Law Reg. (N. S.) 1.

It is claimed here that the shipping receipt or bill of lading constituted a valid and binding contract between the parties, and that upon the loss at sea of the plaintiff's package in the course of its transportation under the contract, by an accidental fire, the defendants were discharged from any obligation to the plaintiff in regard to it; and the court are of opinion that this claim must be sustained.

The receipt was delivered to the plaintiff as the contract of the defendants; it is in proper form, and the terms and conditions are expressed in the body of it in a way not calculated to escape attention. The acceptance of it by the plaintiff, at the time of the delivery of his package, without notice of his dissent from its terms, authorized the defendants to infer assent by the plaintiff. It was his only voucher and evidence against the defendants. It is not claimed that he did not know, when he took it, that it was a shipping contract or bill of lading. It was his duty to read it. The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it. Any other rule would fail to conform to the experience of all men. Written contracts are intended to preserve the exact terms of the obligations assumed, so that they may not be subject to the chances of a want of recollection or an intentional misstatement. The defendants have a right to this protection, and are not to be deprived of it by the willful or negligent omission of the plaintiff to read the paper. The case of *Rice v. Dwight Manufacturing Co.*, 2 Oush. 80, 87, is an authority in point. In an action to recover for work done, the defense was that the work was performed under a special contract, and a paper of printed regulations was shown to have been given to and accepted by the plaintiff as containing the terms of the contract, but which was not signed by either party. The plaintiff denied knowledge of its contents; but it was said by FORBES, J., that where a party enters into a written contract, in the absence of fraud he is conclusively presumed to understand the terms and legal effect of it, and to consent to them. See also *Lewis v. Great Western Railway*

Co., 5 H. & N. 867; *Squire v. New York Central Railroad Co.* 98 Mass. 239.

This case, then, is brought within the rule which authorizes carriers to relieve themselves from losses of this description by express contracts with the employer. It differs from the cases of *Brown v. Eastern Railroad Co.*, 11 Cush. 97, and *Malone v. Boston and Worcester Railroad Co.*, 12 Gray, 388. The limitation relied on in both those cases was in the form of a notice printed on the back of a passenger ticket, relating to baggage; and it was held that there was no presumption of law that the party, at the time of receiving the ticket, had knowledge of the contents of the notice. It is obvious that in those cases the ticket was not designed to be held as the evidence of the contract between the parties. The contract, which was of passenger transportation, was not attempted to be set forth. At most, it was but a check, to be used temporarily and then delivered to the conductor as his voucher, with these notices on the back. The presumption that every man knows the terms of a written contract which he enters into, therefore, did not apply. Nor was the acceptance of the ticket conclusive evidence of assent to its terms.

The recent case of *Buckland v. Adams Express Co.*, 97 Mass. 124, requires notice, because, upon a case in most respects similar to this, a different result was reached by the court. The legal principles upon which that case was decided are those here stated. It was a case upon an agreed statement of facts, and the difference resulted in the application of the law to the facts then presented. It is to be noticed that the receipt containing the limitation relied on was in that case delivered to a workman in the employ of a stranger, who, so far as it appears, had, in that particular instance only, been requested by the plaintiffs to deliver the parcel in their absence, and as a mere favor to them. And it further appeared that the previous course of dealing between the parties was such that, in a majority of instances in which the plaintiffs had employed the defendants to transport like packages, no receipt was made out, and no special contract insisted upon. Under such circumstances it was held that it could not fairly be inferred that the plaintiffs understood and assented to the contents of the receipt as fixing the terms on which the defendants were to transport the merchandise, or that the workman had authority to make an unusual contract.

The same remarks apply to the case of *Perry v. Thompson*, 98 Mass. 249, which is to be distinguished from the case at bar by the

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fact that, in the previous dealings of the parties, property had been received and carried without any notice relating to the carrier's liability having been given, and by the further fact that, when the notice in that instance was received, the printed parts of it were so covered up by the revenue stamp affixed to the receipt that it could not be read intelligibly.

So in *Fillebrown v. Grand Trunk Railway Co.*, 55 Maine, 462, it was held that, when a verbal contract for transportation was made without restriction, its legal effect would not be changed by the conditions in a receipt which was subsequently given to the clerk of the consignor, who delivered the goods at the station, but who had no express authority either to deliver or to contract with the defendants.

These cases do not reach the case at bar, where the delivery of the receipt was directly to the plaintiff; nor would they be held decisive in a case where the delivery was made and the receipt accepted under ordinary circumstances by a special or general agent of the owner, not a mere servant or porter, and who might be regarded as clothed with authority to bind the owner in giving instructions and making conditions affecting the transportation. *Squire v. New York Central Railroad Co.*, 98 Mass. 239.

Judgment for the defendants.

CLARK *et al.* v. WASHINGTON, ETC., INSURANCE COMPANIES.

(100 Mass. 509.)

Bill of sale of vessel as a mortgage. Barratry.

Parol evidence is admissible to show that a bill of sale of a vessel, absolute in form, is a mortgage.

The mortgagee has an insurable interest, distinct from that of the owner, and can recover upon an insurance against barratry of the master, "unless the insured is owner of the vessel," even where the loss occurs by reason of such barratry.

ACTION of contract upon policies of insurance.

It appeared at the trial that the schooner *Lena*, owned by Josiah French, was, by bill of sale made September 29, 1865, conveyed to the plaintiffs and J. Baker & Co. The bill of sale was absolute in

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form. The plaintiffs caused the schooner to be registered in their own name. The insurances were made to the plaintiffs, Clark & Woodward, in February and May, 1866, who, at the time, gave no notice to the insurers that J. Baker & Co. had any interest therein, or that plaintiffs held the vessel otherwise than as owners. The insurances each contained a clause whereby insurance was effected against "barratry of the master, unless the insured be owner of the vessel."

It also appeared that the bill of sale was intended to secure advances to French made previous to the time of its execution, and that it was agreed between plaintiffs and Baker & Co. that their respective claims should be secured *pro rata* by the insurance. French, during all this time, retained possession and control of the vessel.

Evidence was introduced to show that French sent her to the Bay of Islands, where she was June 9, 1866, purposely and fraudulently run ashore by her master, who fraudulently caused a survey and condemnation, and next day sold her, as auctioneer, without authority, for \$350, and cargo for \$50, he being himself interested in the purchase; that the vessel was got off slightly injured and carried away by the purchaser. On receiving notice of all which, plaintiffs abandoned the vessel, which abandonment defendants refused to accept.

It also appeared that the plaintiffs charged French with the amounts paid for the said insurance.

The court refused to nonsuit plaintiffs on these facts, and the case was sent to the jury on the question of damages.

E. D. Sohier, for defendants.

S. Bartlett and *H. A. Scudder*, for plaintiffs.

CHAPMAN, C. J. It appears that the bill of sale from French to the plaintiffs, though absolute in form, was given merely as collateral security for a debt, and that the plaintiffs had never taken possession of the vessel, but French retained possession. Parol evidence is admissible to show the true character of such a transaction. *Howard v. Odell*, 1 Allen, 85; *Blanchard v. Fearing*, 4 id. 118.

The plaintiffs had an insurable interest as mortgagees, distinct from that of French. He had no interest in the policy, and they had no right to charge the premium to him. *King v. State Insur-*

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ance Co., 7 Cush. 1; *Suffolk Insurance Co. v. Boyden*, 9 Allen, 123. The mere charge of the premium to him, without his authority or knowledge, was a void act.

The insurance was against the barratry of the master, "unless the assured be owner of the vessel." The object of such a clause is to protect the insurer against fraud on the part of the agent of the insured. But the vessel having been sent out by French, he is to be regarded as owner *pro hac vice*. *Soares v. Thornton*, 7 Taunt. 627; *Cutler v. Winsor*, 6 Pick. 335. The master having been appointed by him, was his agent, and not the agent of the plaintiffs.

Fraudulently running the vessel on shore, causing survey, condemnation and sale, constituted a barratry of the master. *Goram v. Sweeting*, 2 Wms. Saund. 202, n. 13; *Jones v. Nicholson*, 10 Exch. 28. It furnished ground of abandonment for a total loss. *Dixon v. Reid*, 1 D. & R. 207; S. C., 5 B & Ald. 597.

Judgment for plaintiffs on the verdict.

ADAMS V. O'CONNOR *et al.*

(100 Mass. 515.)

Bailment — rights of bailee.

The possession of goods acquired by plaintiff under a bill of lading is sufficient to maintain an action against one who does not show a better title.

Though the plaintiff had only a special property in the goods to secure advances made upon them, he can recover the whole value of them from a purchaser for cash, and hold the surplus beyond his own interest for the general owner.

ACTION of tort. The facts sufficiently appear in the opinion.

N. Morse, for defendants.

T. Willey, for plaintiff.

GRAY, J. This is an action of tort, in the nature of trover, for twenty-five barrels of whisky, of which the plaintiff had received from Fowle & Company bills of lading and an invoice, to secure advances made by him on the property, and, after its arrival in Boston, had taken possession, by going to the railroad station in company with Fowle, exhibiting the bills of lading to the freight agent,

and agreeing to pay the freight and storage. Fowle received authority from the plaintiff to sell the whisky for cash, and agreed, upon such sale, to repay to him the amount of his advances, with interest, expenses and charges. Fowle afterward sold the property for cash to the defendants, who went with him to the station, paid the freight and storage, and took possession of the whisky, but have never paid for it. The jury have found specially "that the payment of the freight-money by the defendants was not a payment made in good faith in accordance with the terms of sale." The freight and storage were paid together to the same railroad corporation, and were treated throughout the trial as a single item, and both must be deemed to be covered by the words "freight-money" in this finding. The plaintiff afterward called upon the defendants, exhibited his bills of lading and demanded the whisky, but they refused to deliver it.

Upon these facts the law is clear. The possession of the property, acquired by the plaintiff under the bills of lading, was sufficient to maintain this action against any one who did not show a better title. *Burke v. Savage*, 13 Allen, 408. The defendants, as well as the plaintiff, claimed under the bills of lading, and offered no evidence of any other title in themselves, and were, therefore, not injured by their admission in evidence. The sale to the defendants having been found by the jury to have been for cash, was a conditional sale, and vested no title in the purchasers until the terms of sale had been complied with. *Tyler v. Freeman*, 3 Cush. 261; *Whitney v. Eaton*, 15 Gray, 225; *Farlow v. Ellis*, id. 229. The plaintiff, though having only a special property to secure his advances, might in this action recover the whole value of the goods, and would hold the surplus, beyond the amount of his own interest, for the general owner. *Ullman v. Barnard*, 7 Gray, 554. The amount of freight and storage having been paid not in good faith, nor in accordance with the terms of the defendants' contract, could not be demanded by them of the plaintiff as a condition precedent to the delivery of his property to him, and could be deducted from the value of the goods in the assessment of his damages only because the payment inured to his benefit, by discharging the goods from a lien to which they were subject, and without payment of which he could not have obtained his property

Exceptions overruled.

MILLER V. STEVENS *et al*

(100 Mass. 512.)

Oral evidence to explain written contract.

Parol evidence is admissible to show that by the word "barrels," used in a written contract, was intended vessels of a certain kind and capacity, and not a measure of quantity, and that the parties contracting had reference not to a statute barrel, but to certain vessels of uniform size of different capacity from the statute barrel.

"The plaintiff contracted to sell to the defendants one thousand barrels petroleum oil, in two contracts of five hundred barrels each; each of which was in form as follows: 'Bought for account of Messrs. Samuel Stevens & Co., Boston, from Daniel L. Miller, Jr., agent, Philadelphia, five hundred barrels refined petroleum, fire-test one hundred and ten degrees or upwards, color, prime light straw to white, at thirty-eight and one-half cents per gallon, in bond, to be delivered in bonded warehouse in Philadelphia. Order, prime shipping. Terms, cash on delivery; which delivery is to be made during the month of December next, at the buyers' option, they giving the sellers ten days' notice within that month. William Hastei Smith, broker. Philadelphia, October 19, 1866.' The plaintiff was, and is, a resident of Philadelphia. The defendants, at the time in question, resided in Massachusetts, doing business in Boston and New York.

"On December 31, 1866, the plaintiff tendered to the defendants certain specific barrels of refined petroleum oil, which appeared by the evidence to contain forty-two gallons to the barrel, in pursuance of said contracts; but the defendants refused to accept the same, for the reason only, that they denied that the oil was of a fire-test of one hundred and ten degrees. On December 31, 1866, oil had materially fallen in price since the date of the contracts.

"There was no evidence in the case tending to show that the particular oil tendered was in barrels, or indeed in existence at the date of the contracts; and it did not appear whether refined petroleum oil was universally sold in barrels, or sometimes in barrels and sometimes in bulk. There was no evidence offered on that subject; but there was evidence that it was often sold in barrels of forty-two gallons. The plaintiff testified that the common size of the barrel into which it is usual to put petroleum oil in Philadelphia, and in

which, when sold in barrels, it is usually sold, was forty-two gallons. The defendants offered no evidence to the contrary, but objected to any evidence as to the size or measurement of the barrel; but the presiding judge admitted the same.

"The defendants offered and proved the laws of Pennsylvania (and also those of New York, so far as they might affect this case), fixing the denominations of liquid measure, and fixing the barrel at thirty-one and one-half gallons, to which laws reference may be had, and requested the presiding judge to instruct the jury that, in estimating damages, the barrel should be taken as containing thirty-one and one-half gallons, and no more. But it having been shown by the evidence that the plaintiff offered to deliver to the defendants one thousand barrels of oil of forty-two gallons each, which were shown to the defendants' agent, and samples taken by him; and that in all the discussions concerning the delivery between the parties no suggestion was ever made that one thousand such barrels were not what the contract required; and one defendant having testified that he intended, when they were offered, and was ready, to receive those barrels, if the oil was of the requisite fire-test, the court instructed the jury that, if they found from the evidence that forty-two gallons was the usual capacity of barrels of oil, and that the parties understood and intended to contract for such barrels of oil as a specific article of merchandise, and not to use the word 'barrel' in their contract as the statute measure of quantity, then they might estimate the amount of oil agreed to be sold at forty-two thousand gallons, in assessing the damages.

"The jury returned a verdict for the plaintiff, and assessed the damages at \$4,788.53; and the question is reserved for the whole court, upon the agreement of the parties that, if this instruction was erroneous, the damages assessed by the jury shall be diminished in the proportion of thirty-one and one-half to forty-two, and the verdict be amended accordingly."

R. Codman, for the defendants, cited 1 Greenl. Ev., §§ 280, 292-295; 2 id. § 251; *Wadsworth v. Alcott*, 2 Seld. 64; *Dawson v. Kittle*, 4 Hill, 107; *Wheeler v. Newbould*, 5 Duer, 29; *Smith v. Jeffries*, 15 M. & W. 561; *Daniels v. Hudson River Ins. Co.*, 12 Cush. 416; *Barry v. Bennett*, 7 Met. 354; 2 Taylor Ev. § 1064; *Evans v. Myers*, 25 Penn. St. 114; *Smith v. Wilson*, 3 B. & Ad. 728; *Hockin v. Cooke*, 4 T. R. 314; *Many v. Beekman Iron Co.*, 9 Paige,

188; *Sleight v. Rhineland*, 1 Johns. 192; *Noble v. Durrell*, 3 T. R. 271; 1 Greenl. Ev., § 201; *Whitwell v. Wyer*, 11 Mass. 6.

A. A. Ranney, for plaintiff.

GRAY, J. The written contract between the parties does not show whether the word "barrels" is used as describing a quantity merely, or a vessel of a certain kind and capacity; for "barrels" might mean either a quantity or a vessel; and if the vessels intended were of a uniform size, the fixing of the price by the gallon would be equally adapted to either. Parol evidence was therefore admissible to show in which sense the parties intended to use the word; and the presiding judge rightly admitted testimony that refined petroleum was often sold in barrels, and that the usual size of such barrels was forty-two gallons. No evidence was offered that it was ever sold in any other way. The statute of Pennsylvania prescribing the number of gallons to a barrel, as a denomination of liquid measure, does not apply to sales by kegs, casks, or vessels of a particular kind. The evidence that the barrels exhibited by the plaintiff, and from which the defendant's agent took samples, at the time of the plaintiff's offer to deliver, were of the capacity of forty two gallons; that in all the discussions between the parties concerning the delivery, no suggestion was made that such barrels were not what the contract required; and that the defendants at that time intended and were ready to receive those barrels if the oil was of the requisite fire test; was competent to show that the parties, at the time of making the contract, understood and intended to contract for such barrels of oil as a specific article of merchandise, and not to use the word "barrel" as the statute measure of quantity; and the question of the intention of the parties in that respect was rightly submitted to the jury. *Noble v. Durrell*, 3 T. R. 273, 275; *Smith v. Wilson*, 3 B. & Ad. 728; *Clayton v. Greyson*, 6 Nev. & Man. 694; S. C., 5 Ad. & El. 302; *Spicer v. Cooper*, 1 Gale & Dev. 52; S. C., 1 Q. B. 424; *Cullum v. Wagstaff*, 48 Penn. St. 300; *Bradford v. Manly*, 13 Mass. 139; *Putnam v. Bond*, ante, 82; *Stoops v. Smith*, ante, 85.

Judgment on the verdict for the plaintiff.

KERSHAW v. KELSEY.

(100 Mass. 561.)

International law. Construction of statute. Contracts made during rebellion.

The act of congress (1861, ch. 8, § 5) concerning commercial intercourse with states in insurrection, and the proclamations of the president thereunder, do not extend to agreements made in those states between persons being there for the leasing of real estate therein, the payment of rent there, out of the products of the land, or the delivery of and payment for personal property, already upon the demised premises, to be used thereon.

The subsequent unlawful forwarding of cotton raised on the land by the defendant's son does not affect the validity of the agreements contained in the lease.

The facts in this case appear in the opinion.

H. C. Hutchins and A. S. Wheeler, for defendant.

R. M. Morse, Jr., and F. V. Balch, for plaintiff.

GRAY, J. The defendant, a citizen of Massachusetts, in February, 1864, in Mississippi, took from the plaintiff, then and ever since a citizen and resident of Mississippi, a lease for one year of a cotton plantation in that state, and therein agreed to pay a rent of ten thousand dollars, half in cash and half "out of the first part of the cotton crop, which is to be fitted for market in reasonable time." The lessor also agreed to deliver, and the lessee to receive and pay the value of, the corn then on the plantation. It does not appear whether the defendant went into Mississippi before or after the beginning of the war of the rebellion; and there is no evidence of any intent on the part of either party to violate or evade the laws, or oppose or injure the government of the United States. The defendant paid the first installment of rent, took possession of the plantation and corn, used the corn on the plantation, provided it with supplies to the amount of about five thousand dollars, and planted and sowed it, but early in March was driven away by rebel soldiers, and never returned to the plantation, except once in April following, after which he came back to Massachusetts. The plaintiff continued to reside on the plantation, raised a crop of cotton there, and delivered it in Mississippi to the defendant's son, by whom it was forwarded in the autumn of the same year to the defendant

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and he sold it and retained the profits, amounting to nearly ten thousand dollars.

The plaintiff sues for the unpaid installment of rent and the value of the corn. The claims made in the other counts of the declaration have been negatived by the special findings of the jury.

The defendant, in his answer, denied all the plaintiff's allegations, and at the trial contended that the lease, having been made during the civil war, was illegal and void, as well by the principles of international law, as by the terms of the act of congress of 1861, ch. 3, § 5, and the proclamations issued by the president under that act, declaring "all commercial intercourse by and between" the state of Mississippi and other states in which the insurrection existed "and the citizens thereof, and the citizens of the rest of the United States," to be unlawful, so long as such condition of hostility should continue, and that "all goods and chattels, wares and merchandise," coming from such states into other parts of the United States, or proceeding to such states by land or water, together with the vessel or vehicle conveying them, or conveying persons to or from such states, without the license of the president, should be forfeited to the United States. 12 U. S. Stat. at Large, 257, 1262; 13 id. 731.

The judge presiding at the trial ruled that the contracts sued on were legal, and the jury having returned a verdict for the plaintiff, the question of the correctness of this ruling is reported for our decision; the parties agreeing that, if the ruling was correct, the case shall be sent to an assessor; but, if incorrect, judgment shall be entered for the defendant.

This case presents a very interesting question, requiring for its decision a consideration of fundamental principles of international law. It is universally admitted that the law of nations prohibits all commercial intercourse between belligerents, without a license from the sovereign. Some *dicta* of eminent judges and learned commentators would extend this prohibition to all contracts whatever. In a matter of such grave importance, the safest way of arriving at a right result will be to examine with care the principal adjudications upon the subject, most of which were cited in the argument.

The celebrated judgment of Sir WILLIAM SCOTT, in the leading case of *The Hoop*, 1 C. Rob. 196, determined only that all trading with a public enemy, unless by permission of the sovereign, was interdicted; and that all property engaged in such trade was lawful prize of war. None of the numerous authorities there cited went

beyond this. The principal reason assigned is, that in a state of war the question when and under what regulations commercial intercourse, which is a partial suspension of the war, shall be permitted, must be determined on views of public policy by the sovereign, who alone has the power of declaring war and peace; and not by individuals upon their own notions of convenience, and, possibly, on grounds of private advantage, not reconcilable with the general interest of the state. In the case of *The Indian Chief*, 3 C. Rob. 22, the same principle was applied to the case of a foreign merchant resident in the British possessions in India; and all the later cases in the same court were of trading or licenses to trade with the enemy, directly or indirectly.

It is true that, in the case of *The Hoop*, that eminent jurist does also somewhat rely upon the consideration of the total inability to enforce any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. The rule is certainly well settled, that, during any war, foreign or civil, an action cannot be prosecuted by an enemy residing in the enemy's territory, but must be stayed until the return of peace, or, in the words of the old books, *donec terra sint communes*. Staunf. Prerog. fol. 39; Co. Lit. 129, b; *Sanderson v. Morgan*, 39 N. Y. 231; *Wheelan v. Cook*, 29 Maryl. 1. But that rule temporarily restrains the remedy only, without denying or impairing the existence of the right; as was said by the supreme court of New York, while Chancellor KENT presided there, "the present plea only bars the plaintiff, in his character of alien enemy commorant abroad, from prosecuting the suit; it does not so much as touch the merits of the action." *Bell v. Chapman*, 10 Johns. 185. That it has nothing to do with the validity of the contract sued upon is manifest from the case of a ransom bill, which is universally admitted to be a lawful contract, and yet upon which no action can be maintained in a court of common law during the war, but may, after the return of peace. *Ricord v. Bottenham*, 3 Burr. 1734; S. C., 1 W. Bl. 563; *Anthon v. Fisher*, 2 Doug. 650; S. C., 3 id. 178; *Brandon v. Nesbitt*, 6 T. R. 28; 1 Kent's Com. (6th ed.) 107. The reasons assigned by common law judges for the plea of alien enemy are, that an enemy to our government shall not have the benefit and protection of its laws in its courts; and that the fruits of the action may not be remitted to a hostile country, and so furnish resources to the enemy. *Hutchinson v. Brock*, 11 Mass. 122; *Sparrenburgh v. Bannatyne*, 1 B. & P. 170; *McConnell v. Hector*. 3 id

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114. The objection has not been much favored; for even in a real action, after the plaintiff has recovered judgment, alien enemy at the time of the original suit is no good plea to *scire facias* to obtain an execution. *West v. Sutton*, 2 Ld. Raym. 853; S. C., 1 Salk. 2; Holt, 3; and in a personal action brought by an alien friend, his becoming an enemy by the breaking out of war, which could not have been pleaded earlier, has been held no ground for staying judgment after verdict, or execution after judgment, or affirmance of a judgment on error. *Venbrynen v. Wilson*, 9 East, 321; *Buckley v. Lyttille*, 10 Johns. 117; *Owens v. Hannay*, 9 Cranch, 180. No answer in the nature of a plea of alien enemy has been filed in this case, and no objection made to the capacity of the plaintiff to sue, but only to the validity of the contract sued on; and, therefore, no question of the personal disability of the plaintiff is involved, or need be considered, except so far as to show that it is wholly independent of the merits of the cause of action.

In *Potts v. Bell*, 8 T. R. 548, the elaborate arguments of the common lawyers and civilians, and the judgment of the court, were confined to the question of the illegality of a British subject's trading with an enemy, and the single point decided was that an insurance upon such trading was illegal. In *Antoine v. Morshead*, 6 Taunt. 237; S. C., 1 Marsh. 558, it was held that a bill of exchange drawn on England by a British subject, imprisoned in France, payable to another British subject also imprisoned there, and indorsed to a French banker, during the war, might be sued upon by the latter in England after the return of peace; and Chief Justice GIBBS said: "I can collect but two principles from the cases cited by the counsel for the defendant, and they are principles on which there never was the slightest doubt. First, that a contract made with an alien enemy in time of war, and that of such a nature that it endangers the security, or is against the policy of this country, is void; such are policies of insurance to protect an enemy's trade. Another principle is, that, however valid a contract originally may be, if the party become an alien enemy he cannot sue; the crown, during the war, may lay hands on the debt, and recover it; but if it do not, then on the return of peace the rights of the contracting alien are restored, and he may himself sue. No other principle is to be deduced." In *Willison v. Patteson*, 1 Morse, 133; S. C., 7 Taunt. 440, a bill of exchange drawn upon a British subject resident in England, and having funds of an enemy in his hands, by an alien

enemy residing in the hostile territory, payable to his own order, and by him indorsed to a British subject also residing there, was held void, because a direct trading with the enemy. The recent case of *Esposito v. Bowden*, 7 El. & Bl. 763, was upon a charter party for a voyage by a British subject to an enemy's port, which the plea alleged could not be performed without "dealing and trading with the queen's enemies;" and the judgment of the exchequer chamber, as delivered by that excellent commercial lawyer, Mr. Justice WILLES, was equally limited, and states the general proposition upon which the judgment was based in this form: "It is now fully established, that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the crown, is illegal."

We now come to the American cases cited for the defendant. The earliest is that of *Hannay v. Eve*, 3 Cranch, 242, which merely decided that a contract made in fraud of the laws of the United States could not be enforced in the court of the United States. In the latter case of *Kennett v. Chambers*, 14 How. 38, the same principle was applied, and it was held that a contract made in the United States after Texas had declared itself independent of Mexico, but before its independence had been acknowledged by the United States, to convey lands in Texas, in consideration of money advanced in the United States to enable Texas to carry on war against Mexico, was in contravention of the public policy and treaties of the United States, when it was made, and could not therefore be enforced in their courts, after Texas had been admitted into the Union. To say that the present case falls within the same principle is to beg the whole question in controversy.

In *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, the only point discussed or adjudged was, that produce of territory in the occupation of the enemy must be condemned by a prize court as enemy's property, so long as it belonged to the owner of the soil, whatever his natural character or personal domicile. A like rule was held to apply in the recent civil war, in the *Prize Cases*, 2 Black, 635.

In the cases of *The Rapid*, 1 Gallis. 304; *The Julia*, id. 601-604 and *The Emulous*, id. 571, Mr. Justice STORY indeed spoke of the unlawfulness of communications with the enemy as extending to all

contracts and every kind of intercourse. But all such statements were *obiter dicta*; for neither of those cases involved so broad an application. In *The Julia*, he admitted, in the circuit court, that "the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse;" and in delivering the judgment of affirmance in the supreme court, he defined the point decided to be "that the sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views and interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war." 1 Gallia. 601; 8 Cranch, 190. In *The Emulous*, the only question in issue was of the confiscation of enemies' property; and his decree was reversed by the supreme court. *Brown v. United States*, 8 Cranch, 110. His decree in *The Rapid* was affirmed, 8 Cranch, 155. But in that case, as well as in *The Joseph*, 1 Gallia. 545 and 8 Cranch, 451, the decision was simply that the sending of a vessel by an American to or from an enemy's port, after a declaration of war, was a trading with the enemy, which would warrant a condemnation in a prize court.

In delivering the judgment of the supreme court in the case of *The Rapid*, Mr. Justice JOHNSON said: "In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat." "On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country." And, in speaking of the rule of prize law, which condemns property engaged in hostile trade: "the object, policy and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states. Negotiation or contract has, therefore, no necessary connection with the offense. Intercourse inconsistent with actual hostility is the offense against which the operation of the rule is directed." 8 Cranch, 160-162. These expressions would seem to have been intentionally

as they are necessarily, in judicial effect, limited to the case before the court, of actual passage of persons, or transmission of property between the territories of the belligerents. In *Scholesfield v. Eichelberger*, 7 Pet. 586, in which a contract made with an enemy during war for the purchase of goods was held void, the same learned judge, after asserting in the broadest terms, and outside of the question at issue, that "the doctrine is not at this day to be questioned, that, during a state of hostility, the citizens of the hostile states are incapable of contracting with each other," took the precaution of adding: "To say that the rule is without exception would be assuming too great a latitude."

The general statements of Mr. Justice DANIEL, in *Jecker v. Montgomery*, 18 How. 110, and Mr. Justice CLIFFORD, in *Hanger v. Abbott*, 6 Wall. 532, that as a consequence of the state of war all communication and intercourse between the citizens of one belligerent and those of the other are unlawful, were manifestly but repetitions of earlier *dicta*, without having occasion to scrutinize them with care; for, in the first case, the vessel and cargo condemned as prize were knowingly sent by a citizen during war to an enemy's port; and, in the second, the only question was of the suspension of the running of the statute of limitations while the courts were closed during war. *The Ouachita Cotton*, 6 Wall. 521, was a case of a sale of merchandise, which was strictly an act of commercial intercourse.

In the most recent judgment of the supreme court of the United States upon this subject, delivered since the argument of this case, the general doctrine is thus stated by Mr. Justice DAVIS: "By a universally recognized principle of the public law, commercial intercourse between states at war with each other is interdicted. It needs no special declaration on the part of the sovereign to accomplish this result, for it follows, from the nature of war, that trading between the belligerents should cease. If commercial intercourse were allowable, it would oftentimes be used as a color for intercourse of an entirely different character; and in such a case the mischievous consequences that would ensue can be readily foreseen. But the rigidity of this rule can be relaxed by the sovereign, and the laws of war so far suspended as to permit trade with the enemy. Each state settles for itself its own policy, and determines whether its true interests are better promoted by granting or withholding licenses to trade with the enemy." *United States v. Lane*, 8 Wall. 195. See also *McKee v. United States*, id. 166.

Chancellor KENT, in a most able and learned opinion delivered in the court of errors of New York, and again in his Commentaries, asserted with great positiveness, as a necessary consequence from the doctrine of the illegality of all commercial intercourse and traffic, that all contracts made with the enemy during war were utterly void. *Griswold v. Waddington*, 16 Johns. 438; 1 Kent's Com. 67. But the case of *Griswold v. Waddington*, as the learned chancellor candidly admitted at the outset of his opinion, was a case of commercial intercourse, in the strictest sense, a dealing between commercial houses and with commercial paper; and nothing further was brought into judgment, except that a commercial partnership between the citizens of two countries was dissolved by the breaking out of war between them. His more general statements, therefore, in the opinion, like the repetition of them in his Commentaries, have not the weight of an adjudication.

The only authorities, English or American, cited by Mr. Justice STORY or Chancellor KENT, which afford any color for extending the doctrine beyond trading directly or indirectly with the enemy, or insurances upon or licenses for such trade, are, one ancient order in the Black Book of the admiralty, two cases in the Year Books, and a dictum in the court of chancery.

The Black Book of the admiralty contains a direction that "inquisition be taken of all those who intercommunicate (*entrecommunent*), buy or sell with any of the enemies of our lord the king, without special license of the king or of his admiral." It might well be doubted whether *entrecommunent*, in its connection with buying and selling, was intended to include any thing but trading or commercial intercourse. But it is sufficient to observe that, as that great legal antiquary, John Selden, tells us "the book itself is rather a monument of antiquity, yet not above about Hen. VI, than of authority, and rather as a purpose of what was in some failing project, than ever in use and judgment held authentical. Most of it is against both the now received and former practice." Selden's Notes to Fortescue, ch. 32, 3 Selden's Works, 1898.

Chancellor KENT observes: "BRIAN, J., is made to say in 19 Edw IV, Bro. Ab. tit. Denizen et Alien, pl. 20, that an obligation made to the enemy of the king is void." But it appears, both in the original Year Book of 19 Edw. IV, 6, pl. 4, and in Chief Justice BROOKE'S Abridgment, that the obligation sued on was made in the third year of the king; and the plea was that the plaintiff was born in the alle-

giance of the king of Denmark, who, and all his subjects, had been enemies since the eighth year of the king; in other words, not that the plaintiff was an enemy at the making of the obligation, but only at the time of bringing suit, that is to say, an ordinary plea of alien enemy, to the disability of the plaintiff, and not the validity of the contract. The *dictum* of Chief Justice BRIAN was only that "perhaps the obligation would be void against the party, but the king should have it;" and even of this Chief Justice BROOKE added in the place cited, and also in pl. 16 of the same title, *quære*; and Chancellor KENT himself, when chief justice of the supreme court of New York, said: "The doctrine once held in the English courts, that an alien's bond became forfeited by the war (Year Book, 19 Edw. IV, pl. 6) would not now be endured. The plea is called in the books an odious plea, and the latter cases concur in the opinion that the ancient severities of war have been greatly and justly softened by modern usages, the result of commerce and civilization." *Clarke v. Morey*, 10 Johns. 71, 72. The authority of the *dictum*, as evidence of the law of nations at this day, may be weighed by the ruling in the same court a few years earlier (also referred to by Chancellor KENT in *Griswold v. Waddington*), that "all men may seize such goods as enemies of the king bring into the kingdom, and hold the goods to their own proper use." 7 Edw. IV, 13, 14, pl. 5; Bro. Ab. Property, 38. It is hardly necessary to remark that, by our law, enemies' goods on land within our territory cannot be seized by private citizens to their own use, nor even by the government, without an act of congress. *Brown v. United States*, 8 Cranch, 110; *Alexander's Cotton*, 2 Wall. 404.

In *Ex parte Boussemaker*, 13 Ves. 71, upon an application by an alien enemy to prove a debt in bankruptcy, Lord ERSKINE did say: "If this had been a debt arising from a contract with an alien enemy, it could not possibly stand, for the contract would be void." But the nature of the debt does not appear by the report; and this *dictum* was wholly extra-judicial; for the contract was made before the war, and the debt was allowed to be proved, reserving the dividend.

The continental writers, cited by Chancellor KENT, fall far short of supporting his assertion that they "unitedly prove that all private communication and commerce with an enemy, in time of war, are unlawful." Judge STORY, as we have already seen, in the case of *The Julia*, 1 Gallis. 601, acknowledged that he usually confined the

prohibition to commercial intercourse; and hardly any of them, even as quoted by Chancellor KENT, go beyond that. The strongest, according to his statement, would appear to be Grotius, Cleirac and Valin. But Grotius, in the place relied on, by no means "says expressly that private contracts with the enemy, touching private actions and things, are unlawful, and controlled by the duty which the citizen owes to his own state." At the utmost, he leaves it an open question; for his words are: *Sed de ipsorum actionibus et rebus quæri potest; quia videmus hæc quoque concedi hostibus non posse sine aliquo damno partis; unde videri possunt talia pacta illicita cum civibus ob jus supereminens civitatis;* and again: *Lex quidem posset adimere subditis aut perpetuis aut temporariis hanc potestatem; sed neque lex hoc semper facit, parcat enim civibus, etc.* De Jure Belli, lib. 3, ch. 23, art. 5. And the positions of Cleirac and Valin are apparently founded not upon the general law of nations, but upon particular ordinances of France. Cleirac, 197; 2 Valin, 31, 253.

On the other hand, in the case of *Coolidge v. Inglee*, 13 Mass. 26, which was an action on a promissory note given by one American citizen to another, in consideration of the sale to him of a British license, Mr. Justice JACKSON, delivering the unanimous judgment of this court, after deliberate advisement, and speaking of the argument that all intercourse with an enemy is unlawful, said: "This general proposition cannot be maintained in the unlimited extent to which it has been carried in the argument for the defendant. Commercial intercourse, between two nations at war, is understood to be prohibited. This interdiction applies, in general, to any species of commerce by which the enemy may be benefited at the expense of our own country. But the books of the highest authority on the law of nations, and the usages of all civilized people in modern times, abundantly prove that intercourse is not universally prohibited, and that even contracts with an enemy are in some cases allowable." And after carefully examining in detail the statements of the text-writers, expressing the belief that "the prohibition is confined among all civilized nations in modern times, to such intercourse as is commercial;" and dismissing this idea of something mysteriously noxious and criminal in every kind of intercourse with an enemy," he proceeds to the consideration of the question whether the contract sued on was lawful, and arrives at the result that it was. That decision was, indeed, overruled by the supreme court of the United States in *Patton v. Nicholson*, 3 Wheat. 204. on the

ground that the use of such a license by a citizen was unlawful. But this only shows that the general principle was misapplied in *Coolidge v. Inglee*, not that it was unsound or inaccurately stated. The wrong application of a principle does not weaken either the principle itself or the obligation of courts to adhere to it. *Capen v. Barrows*, 1 Gray, 380. That a citizen could not, consistently with a state of hostility, and with his duty to his own country, take or use a license from the public officers of the enemy, does not affect the extent of the right of communication or contract between private citizens. *Musson v. Fales*, 16 Mass. 332, was a case of trading or commercial intercourse, which was held not to be so unlawful as to be no foundation for an action at law by a party who did not know that the party with whom he dealt was an enemy, and exhibits no intention to modify the statement of the general doctrine in *Coolidge v. Inglee*.

The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents, which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text-books are taken from the *dicta*, which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. 2 Kent Com. 63. When a creditor, although a subject of the enemy, remains in the country of the debtor, or has

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a known agent there, authorized to receive the amount of the debt, throughout the war, payment there to such creditor, or his agent, can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offense would be imputable to him, and not to the person paying him the money. *Conn. v. Penn.*, Pet. C. C. 496; *Denniston v. Imbrie*, 3 Wash. C. O. 396; *Ward v. Smith*, 7 Wall. 447; *Buchanan v. Curry*, 19 Johns 137. The same reasons cover an agreement made in the enemy's territory to pay money there out of funds accruing there, and not agreed to be transmitted from within our own territory; for, as was said by the supreme court of New York in the case last cited, "the rule is founded in public policy, which forbids, during war, that money or other resources shall be transferred so as to aid or strengthen our enemies. The crime consists in exporting the money or property, or placing it in the power of the enemy.

Public international law, being the rule which governs the intercourse of one nation and its subjects with other nations and their subjects, is ordinarily limited, so far as rights of property and contracts are concerned, to movable, or, in the phrase of the common law, personal property, which is in its nature capable of being carried or transmitted from one country to the other; and does not usually touch private interests in immovable property or real estate; although any government may doubtless, by express law or edict appropriate or confiscate for its own benefit the use, the profits, or even the title, of land within its own territory or occupation, belonging to subjects of the enemy. 3 Phillimore's International Law, 135, 731; *Reed v. Reed*, 1 Munf. 619; *Smith v. Maryland*, 6 Cranch, 286; *Fairfax v. Hunter*, 7 id. 622, 623, 631; *Union Insurance Co. v. United States*, 6 Wall. 759. The title of aliens in real estate is usually left to be regulated by the municipal law, and, under our system of government, by the laws of the several states, except so far as controlled by treaties with foreign powers *Chirac v. Chirac*, 2 Wheat. 259; *Spratt v. Spratt*, 1 Pet. 343; S. C., 4 id. 393; *Bonaparte v. Camden & Amboy Railroad Co.*, Bald. 205; *Montgomery v. Dorien*, 7 N. H. 475; 2 Kent Com. 70, 71.

By the common law, as declared by the American courts, an alien may take land by purchase, either by grant or by devise, and hold

or convey the title, or in time of peace recover it by suit, subject in either case to be divested by inquest of office. *Fairfax v. Hunter*, 7 Cranch, 603; *Craig v. Radford*, 3 Wheat. 594; *Doe v. Robertson*, 11 id. 332; *Sheaffe v. O'Neil*, 1 Mass. 256; *Fox v. Southack*, 12 id. 143; *Wilbur v. Tobey*, 16 Pick. 179, 180; *Waugh v. Riley*, 8 Met. 290; 2 Kent Com. 61. It would seem to be a necessary corollary from this, and such is the better opinion, that he may, unless restrained by statute, take and hold a lease of real estate, at least until office found. Co. Lit. 2 B., and Hargrave's notes; 2 Kent Com. 61, 62.

In regard to real estate, there is no difference between an alien friend and an alien enemy, except that the latter cannot maintain an action to recover it while the war lasts, and that it may be confiscated by an extraordinary act of the government. In the great case of *Hunter v. Fairfax*, 1 Munnf. 218, and 7 Cranch, 603, better known as *Martin v. Hunter*, 1 Wheat. 304, the highest courts of Virginia and of the United States, though they differed upon the questions whether the latter had jurisdiction of the case, and whether there had been proceedings equivalent to an inquest of office, were in accord, upon this point; and it was admitted, in the court of appeals of Virginia, and adjudged by the supreme court of the United States, that a British subject, being an alien enemy, could take lands by devise from a citizen during the revolutionary war. In the court of appeals, Judge FLEMING said: "I believe it is not, or ought not to be, controverted at this day, that an alien may take land within the commonwealth by purchase, as well by devise as by grant or other conveyance, and hold the same until something further be done to divest him of his right, to wit, office found." 1 Munnf. 233. And Judge ROANE said: "The right of the commonwealth to lands purchased by an alien is an ordinary right derived from the common law. It exists at all times. It is independent of, and does not arise out of, a state of war." "It results from a mere municipal regulation. It accrues not because the person purchasing is an enemy, but because he is an alien. It is not a right pointed against the subjects of a particular power with whom we may chance to be at war, but against the subjects of all foreign nations whatsoever." Id. 226, 618. Mr. Justice STORY, in delivering the opinion of the majority of the supreme court of the United States, stated the law upon this point thus: "It is clear, by the common law, that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of law

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but he may by the act of the party. This principle has been settled in the year books, and has been uniformly recognized as sound law from that time. Nor is there any distinction, whether the purchase be by grant or devise. In either case, the estate vests in the alien, not for his own benefit, but for the benefit of the state; or, in the language of the ancient law, the alien has the capacity to take, but not to hold, lands, and they may be seized into the hands of the sovereign. But until the lands are so seized, the alien has complete dominion over the same." "We do not find that, in respect to these general rights and disabilities, there is any admitted difference between alien friends and alien enemies. During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. But as to capacity to purchase, no case has been cited in which it has been denied." "Indeed, the common law in these particulars seems to coincide with the *jus gentium*." 7 Cranch, 619, 620. Mr. Justice JOHNSON agreed with the rest of the court upon this question, and said: "The disability of an alien to hold real estate is the result of a general principle of the common law, and was in no wise attached to the individual on account of his conduct in the revolutionary struggle." Id. 628, *et seq.* And the doctrine that an alien enemy might acquire title in lands by purchase during the war was again distinctly recognized and affirmed in *Craig v. Radford*, 3 Wheat. 594. See also *Jackson v. Clarke*, id. 1, and note; *Stephen, v. Swann*, 9 Leigh. 414, 415; *Yeo v. Mercereau*, 3 Harrison, 397.

In a civil war it is well settled that the sovereign has belligerent as well as sovereign rights against his rebel subjects, and may exercise either at his discretion. *Rose v. Hindly*, 4 Cranch, 272; *The Army Warwick*, 2 Sprague, 123; S. C., and *other Prize Cases*, 2 Black, 635; *Alexander's Cotton*, 2 Wall. 419. The act of congress and the proclamations of the president upon which the defendant relies in this case, are in terms limited to the prohibition of commercial intercourse, and the conveyance or transmission of goods and merchandise between the territories occupied by the two belligerents; and thus clearly manifest the intention of the government, in accordance with what we have seen to be the general law of nations, that commercial intercourse, and commercial intercourse only, should be prohibited. They clearly do not extend to agreements made in the enemy's territory between two persons being there, for the leasing of real estate therein, the payment of rent there, out of the product of the land, or the delivery of and payment

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for personal property already upon the demised premises, and to be used thereon. The scope and meaning of the words may be illustrated by referring to the equivalent words in that article of the constitution which confers upon congress "power to regulate commerce with foreign nations, and among the several states," which describe, as Chief Justice MARSHALL says: "the commercial intercourse between nations and parts of nations, in all its branches," and, "every species of commercial intercourse between the United States and foreign nations." *Gibbons v. Ogden*, 9 Wheat. 190, 193. No one would contend that congress, under the power to regulate commerce, could legislate about conveyances or leases of land, or the transfer of money or personal property within a state.

The lease now in question was made within the rebel territory, where both parties were at the time, and would seem to have contemplated the continued residence of the lessee upon the demised premises throughout the term; the rent was in part paid on the spot, and the residue, now sued for, was to be paid out of the produce of the land; and the corn, the value of which is sought to be recovered in this action, was delivered and used thereon. No agreement appears to have been made as part of, or contemporaneously with, the lease, that the cotton crop should be transported, or the rent sent back, across the line between the belligerents; and no contract or communication appears to have been made across that line, relating to the lease, the delivery of possession of the premises or of the corn, or the payment of the rent of the one, or the value of the other. The subsequent forwarding of the cotton by the defendant's son from Mississippi to Massachusetts may have been unlawful; but that cannot affect the validity of the agreements contained in the lease. Neither of these agreements involved or contemplated the transmission of money or property, or other communication between the enemy's territory and our own. We are, therefore, unanimously of opinion that they did not contravene the law of nations or the public acts of the government, even if the plantation was within the enemy's lines; and that the plaintiff, upon the case reported, is entitled to recover the unpaid rent and the value of the corn.

We need not, therefore, consider the questions, argued at the bar, upon the effect of the military occupation of a portion of the state of Mississippi by the national forces, or of the license to the plaintiff from the military commander.

Judgment for the plaintiff; case referred to an assessor.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

SCHNEIDER, appellant, v. THE PROVIDENT LIFE INSURANCE Co.

(34 Wis. 28.)

Insurance against accident. Negligence. Wanton exposure.

In an action upon a policy of insurance against accident, the question whether or not the injured party was guilty of negligence contributing to the accident does not arise.

Where the plaintiff was killed, while attempting to get upon a train of cars in slow motion, *held*, that it was not such wanton exposure as would excuse the company from liability under a provision in the policy that the company should not be liable for any injury happening to the assured by reason of his "willfully and wantonly exposing himself to unnecessary danger or peril."

APPEAL from a judgment of nonsuit in an action upon a policy of insurance against injury or death by accident. The facts appear in the opinion.

A. S. Sanborn and S. U. Pinney, for appellant.

Palmer, Hooker & Pitkin, for respondent.

PAINÉ, J. This action was upon a policy, by which Bruno Schneider was insured against injury or death by accident. He attempted to get on a train of cars while in slow motion, and fell under them and was killed. The policy contained a clause that the company should not be liable for any injury happening to the assured by reason of his "*willfully and wantonly* exposing himself to any unnecessary danger or peril." And on the trial the plaintiff was nonsuited, upon the ground that the death was within this exception

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But the position most strongly urged by the respondent's counsel in this court, was, that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word "accident," which has never been established, either in law or common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus, men are injured by the careless use of fire-arms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, where it can readily be seen afterward that a little greater care on their part would have prevented it. Yet such injuries, having been unexpected, and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers, under the heading, "accidents through carelessness."

There is nothing in the definition of the word that excludes the negligence of the injured party as one of the elements contributing to produce the result. An accident is defined as "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and, therefore, not expected."

An accident may happen from an unknown cause; but it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and, therefore, unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident.

It is true that accidents often happen from such kinds of negligence; but, still, it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle; the servant fills the lighted lamp with kerosene a hundred times without injury. The next time, the gun is discharged and the lamp explodes. The result was unusual, and, therefore, as unexpected as if it had been in all the previous instances. So there are, undoubtedly, thousands of persons who get on and off from cars in motion without accident where one is injured; and, therefore, when

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an injury occurs, it is an unusual result, and unexpected, and strictly an accident. There are not many authorities on the point. The respondents' counsel cites *Theobald v. The Railway Passengers' Assurance Co.*, 26 Eng. Law & Eq. 432, not as a direct authority, but as containing an implication that the negligence of the injured party would prevent a recovery. I do not think it can be construed as conveying any such intimation. The insurance there was against a particular kind of accident—that was a railway accident; and the only question was, whether the injury was occasioned by an accident of that kind. The court held that it was, and although it mentions the fact that there was no negligence on the part of the assured, that cannot be considered as any intimation what would have been the effect of negligence if it had existed.

The general question as to what constitutes an accident was considered in two subsequent cases in England. The first was *Sinclair v. The Maritime Passengers' Assurance Co.*, 107 E. C. L. 478, in which the question was, whether a sun-stroke was an accident within the meaning of the policy. The court held that it was not, but was rather to be classed among diseases occasioned by natural causes, like exposure to malaria, etc.; and, while admitting the difficulty of giving a definition to the term "accident," which would be of universal application, they say they may safely assume "that some violence, casualty or *vis major* is necessarily involved." There could be no question in this case, of course, but that all these were involved.

In the subsequent case of *Trew v. Railway Passengers' Assurance Co.*, 6 Hurl. & Nor. 839, the question was, whether a death by drowning was accidental. The counsel relied on the language of the former case, and urged that there was no external force or violence. But the court held, that, if the death was occasioned by drowning, it was accidental, within the meaning of the policy; and, in answer to the argument of counsel, they said: "If a man fell from a house-top, or overboard from a ship, and was killed; or, if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be, that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases."

There was no suggestion that there was any question to be made as to the negligence of the deceased; and yet the court said: "We

think it ought to be submitted to the jury to say whether the deceased died from the action of the water or natural causes. If they are of the opinion that he died from the action of the water, causing asphyxia, that is a death from external violence within the meaning of this policy, *whether he swam to a distance and had not strength enough to regain the shore*, or on going into the water got out of his depth.

Now either of these facts would seem to raise as strong an inference of negligence as an attempt to get upon cars in slow motion. Yet the court said, that, although the drowning was occasioned by either one of them, it would have been an accidental death within the meaning of the policy, and the plaintiffs entitled to recover. I cannot conceive that it would have made such a remark, except upon the assumption that the question whether the injured party was guilty of negligence contributing to the accident does not arise at all in this class of cases. I think that is the true conclusion, both upon principle and authority, so far as there is any upon the subject; and the only questions are, first, whether the death or injury was occasioned by an accident within the general meaning of the policy, and, if so, whether it was within any of the exceptions.

This conclusion is also very strongly supported by that provision of the policy under which the plaintiff was nonsuited. That necessarily implies that any degree of negligence, falling short of "willful and wanton exposure to unnecessary danger," would not prevent a recovery. Such a provision would be entirely superfluous and unmeaning, in such a contract, if the observance of due care and skill on the part of the assured constituted an element to his right of action, as it does in actions for injuries occasioned by the negligence of the defendant.

The question, therefore, remains, whether the attempt of the deceased to get upon the train was within this provision, and constituted a "willful and wanton exposure of himself to unnecessary danger." I cannot think so. The evidence showed that the train having once been to the platform, had backed so that the cars stood at some little distance from it. While it was waiting there, the deceased was walking back and forth on the platform. It is very probable that he expected the train to stop there again before finally leaving; but it did not. It came along, and while moving at a slow rate, not so fast as a man would walk, he attempted to get on, and by some means fell either under or by the side of the cars, and was

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crushed to death. The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action based upon the negligence of the company, if there had been any. But it does not seem to have contained those elements which could be justly characterized as willful or wanton. The deceased was in the regular prosecution of his business. He desired and expected to leave on that train. Finding that he would be left unless he got on while it was in motion, it was natural enough for him to make the attempt. The strong disinclination which people have to being left would impel him to do so. The railroad employees were getting on at about the same time. Imprudent though it is, it is a common practice for others to get on and off in the same manner. He had undoubtedly seen it done, if he had not done it himself, many times, without injury. I cannot regard it, therefore, as a willful and wanton exposure of himself to unnecessary danger, within the meaning of the policy.

Judgment reversed and venire de novo awarded.

OSBORN *et al.*, appellant, v. HART *et al.*

(24 Wis. 88.)

Eminent domain. Taking land for a private road.

The legislature cannot authorize the taking of private property for a private road without the consent of the owner, even if compensation is made therefor.

APPEAL from the judgment of the circuit court affirming the proceedings of the defendants, supervisors of a town, in laying out a private road through the lands of the appellant.

Fuller & Dyer, for appellants.

Bennet & Ullman, for respondents, cited *Beekman v. S. & S. R. R. Co.*, 3 Paige, 45; *Varick v. Smith*, 5 id. 137; *Comm. v. Breed*, 4 Pick. 460, 463; *Boston Water Power Co. v. B. & W. R. R. Corp.*, 28 id. 394; *Harvey v. Thomas*, 10 Watts, 63; *Perrine v. Farr*, 2 Zab. 357; *Snyder v. Warford*, 11 Mo. 513; NELSON, J., in *Taylor v. Porter*, 4 Hill, 148.

COLE, J. By our statute, whenever an application is made to the town supervisors, by any freeholder whose land is excluded from the highway, to lay out a private road, the supervisors are authorized to lay out such private road, the damages to the owner of the land through which such road may be laid, to be ascertained and determined as in case of laying out a public highway; except that the applicant for such private road shall, in all cases, pay the damages and costs arising from the laying out of such road. Section 70, ch. 19, R. S. The next section is as follows: "Every such private road, when so laid out, *shall be for the use of the applicant, his heirs or assigns*, but not to be converted to any other purposes than that of a road; *nor shall the occupant or owner of the land through which such road shall be laid out be permitted to use the same as a road*, unless he shall have signified his intention of so making use of the same to the supervisors, or the jury who ascertained the damages sustained by laying out such road, and before such damages were so ascertained." The next section provides that the person for whose benefit a private road is laid out shall keep the same in repair, and build all fences required by the opening of such road. Sec. 72.

The only question in this case is, whether these provisions of law authorizing private roads to be laid through the lands of persons not consenting thereto, are valid, and can be sustained. And we are all clearly of the opinion that they are invalid, and that the legislature cannot authorize the taking of private property for a private road, which is a mere private use, even if compensation is made therefor. Such a road, under our statute, at least, is established for "*the use of the applicant, his heirs or assigns*;" and the owner, through whose lands it may be laid, is not permitted to use the same as a road, unless he signifies his intention of so making use of it to the supervisors, or to the jury, at the time of the assessment of damages. "The road is private property, paid for and owned by the applicant. The public has no title to, nor interest in it. No citizen has a right to use the road as he does the public highway. He can only use it when he has business with the road owner, or some other lawful occasion for going to the land intended to be benefited by the road. He can only justify an entry on the road when he could justify an entry on the land on account of which the road was laid out." BROWNSON, J., in *Taylor v. Porter*, 4 Hill, 140, 142. When, therefore, land is taken for a private road under our statute, it is taken for a private and not a public use; the public has no right to use

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the road, but it is laid out solely for the benefit and convenience of the applicant. In some of the states it has been held that these roads, although termed private, yet were in fact public roads, so far as the right to use them was concerned, and upon this ground the power of the legislature to authorize them to be laid out has been sustained. *Perrine v. Farr*, 2 Zab. 356; *In re Hickman*, 4 Harrington, 580. There is no ground, however, for any such conclusion in view of the clear and express language of our statute, which declares that the private road, when laid out, "shall be for the use of the applicant, his heirs and assigns;" and which even forbids the owner of the land from using the road, unless he has signified his intention to make use of it before the damages are assessed. But this question whether the legislature can authorize private roads to be opened through the land of persons not consenting thereto, even upon making compensation, has been so fully discussed in *Taylor v. Porter*, *supra*; *Sadler v. Langman*, 34 Ala. 311; and *Dickey v. Tenneson*, 27 Mo. 373, that further remarks here seem to be unnecessary. These cases, and many others, which might be cited to the same point, while fully recognizing the doctrine of eminent domain, by which private property may be appropriated to public use upon compensation being made therefor, still deny that it can be taken for strictly private purposes without the consent of the owner, whether compensation is made or not. And it seems to us that the assertion of a right on the part of the legislature to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest is not promoted thereby, is claiming a despotic power, and one inconsistent with every just principle and fundamental maxim of a free government. We do not think the power exists in this state. It follows from these views that the judgment of the circuit court must be reversed, and the cause be remanded, with directions that it enter judgment that the proceedings of the respondents in laying out the private road mentioned in the writ of *certiorari*, and answer thereto, be vacated and set aside.

Ordered accordingly.

Congar v. The Chicago and Northwestern Railway Co.

CONGAR V. THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, appellants.

(24 Wis. 187.)

Common carriers—liability for goods missent. Notice to agent, when notice to principal.

The general rule, that notices to an agent is notice to the principal, is subject to the limitation that the notice must be to the agent when acting within the scope of his agency, and must relate to the business in which he is engaged by authority of his principal.

Where the consignor of goods is guilty of negligence, in not properly marking their destination upon them, common carriers are not liable for injuries arising from their being missent.

APPEAL from a judgment of the circuit court sustaining a demurrer to the answer.

The plaintiff shipped trees and other nursery stock over the road of the defendants, directed to "Iuka, Iowa," Iuka in Tama county being the place intended. By mistake of the defendants' agent in Chicago they were transported to Iuka, Keokuk county, Iowa. By reason of this mistake the trees and stock became worthless, and this action was brought to recover damages. The material allegations of the pleadings are set forth in the opinion.

A. A. Jackson, for appellant.

Murphey & Cravath, for respondent.

DIXON, C. J. The decision of the court below, as shown by the written opinion of the learned judge found in the printed case, turned upon the point that, for the purpose of charging the company with negligence in shipping the goods over the wrong road, notice to any of its agents was notice to the company. In other words, the court held, that the knowledge of the agents residing in the state of Iowa, and transacting the business of the company there, of a place in that state named Iuka, and that goods destined for that place were to be deposited at the nearest station on the line of the company's road, called Toledo, was the knowledge of the company, so as to make the company responsible for any injury resulting from the mistake of its agents residing and transacting its

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business at the city of Chicago, in the state of Illinois, in forwarding the goods from the latter place by another railroad, instead of over the company's own road, although such mistake occurred without any negligence whatever on the part of the agents making it; but after they had taken reasonable and proper care to ascertain the route by which the goods should be forwarded, and had forwarded them in accordance with the information so obtained. This, we think, was an erroneous application of the doctrine that notice to the agent is notice to the principal. Such notice, to be binding upon the principal, must be notice to the agent when acting within the scope of his agency, and must relate to the business, or, as most of the authorities have it, the *very* business, in which he is engaged, or is represented as being engaged, by authority of his principal. It must be the knowledge of the agent, coming to him while he is concerned for the principal, and in the course of the very transaction which is the subject of the suit, or so near before it that the agent must be presumed to recollect it. Story on Agency, § 40, and 2 Kent's Com. 630, and *note*, and cases cited. Notice, therefore, to the agents in Iowa, distant some two or three hundred miles from the city of Chicago, who had distinct duties to perform, and were not at all concerned in the business of forwarding the goods from Chicago, was not such notice as will bind the company in relation to that business, the same having been transacted by other agents, who had no such notice. This seems very clear, when we consider the reason and ground upon which this doctrine of constructive notice rests. The principal is chargeable with the knowledge of his agent, because the agent is substituted in his place, and represents him in the particular transaction; and it would seem to be an obvious perversion of the doctrine, and to lead to most injurious results, if, in the same transaction, the principal were likewise to be charged with the knowledge of other agents, not engaged in it, and to whom he had delegated no authority with respect to it, but who were employed by him in other and wholly different departments of his business.

The complaint charges that the place called Iuka, in Tama county, Iowa, to which the goods were intended to be sent, was known to the agents of the company residing and doing business along the line of its road in the state of Iowa, and that the station where such goods were to be deposited was Toledo. The answer alleges that the same place was unknown to the officers and agents of the com-

pany at Chicago; that they were informed that said Iuka was situated in Keokuk county, in the state of Iowa, and near the line of the Burlington and Missouri railroad; that they examined a map of Iowa used by shippers, and kept in the office of the defendant, for the purpose of ascertaining where said Iuka was situated; and that said map represented said Iuka as being in Keokuk county aforesaid. The answer further alleges that the goods were directed to "C. E. Cox, Iuka, Iowa," without giving the name of the county, or other directions to indicate to what part of the state, or to what railroad station in the state, the same were consigned, or by what line of railroad the same were to be forwarded. It appears to this court, therefore, upon the pleadings, that no cause of action for negligence is stated against the company, but that, if there was negligence on the part of any one, it was upon the part of the plaintiff in not having marked the goods with the name of the county, or otherwise with that of the railway station, or with the line of road by which they were to be sent. The demurrer to the answer should, therefore, have been overruled, and the order sustaining it must be reversed, and the cause remanded for further proceedings according to law.

So ordered.

AKERLEY v. VILAS, appellant.

(24 Wis. 165.)

Transfer of cause to federal court. Order for appealable.

An order of a state court, transferring a cause to the federal courts under the act of congress of March 2, 1867, is an appealable order, and the state courts have jurisdiction to hear and determine the appeal.

Where there has been a trial in an action at law, or a final hearing in a court of equity, and an adjudication upon the merits, it is too late to remove the cause into the federal court under said act, notwithstanding the fact that the judgment may have been reversed on appeal and the cause remanded for new trial or further proceedings.

APPEAL from an order transferring the cause to the United States circuit court for the district of Wisconsin.

Akerley v. Vilas.

W. F. Vilas, with him *Spooner & Lamb*, for appellant.

Finches, Lynde & Miller, for respondent, cited to the point that the order was not appealable, *Gordon v. Longest*, 16 Pet. 104; 6 Wall. 247; *Livermore v. Jenks*, 11 How. Pr. 479; 3 Grant's Cases, 418, 420, 436; 25 Vt. 716; *Kanouse v. Martin*, 15 How. 198.

PAINÉ, J. This is an appeal from an order of the Dane circuit court, sending the case to the United States circuit court for the district of Wisconsin. The application for removal was made by the plaintiff under the act of congress of March 2, 1867; and the appellant claims that the order was erroneous upon two grounds; first, that the case was not within the act; secondly, that if it were within it, the act itself, so far as it professes to authorize a non-resident plaintiff, who had commenced his suit in the state court, to obtain a removal, is invalid.

The respondent's counsel have declined to argue either of these questions, but have contented themselves with simply submitting and briefly discussing the proposition that this court has no jurisdiction to hear and determine this appeal. Of course this question must be determined upon the hypothesis that it is possible that the case may not have been within the act of congress, and that, even if within it, the act may have been invalid. Counsel assume this possibility, for they say that the appellant's remedy (if, indeed, he has any), "is to apply to the federal court to remand the case to the state court." In support of the position, they refer to two classes of authorities; but these wholly fail to sustain it, and, in truth, warrant directly the opposite conclusion. And it would seem impossible to have drawn any such inference from them, except by confounding the distinction between the two classes, and applying the doctrines of both indiscriminately to each. Thus, they first refer to several cases, holding that, where a proper application for a removal is made, in a case where the party is entitled to a removal by law, the jurisdiction of the state court ceases, and every subsequent step, except that of sending the case away, is *coram non judio* and void. They next cite another class, holding that, where the order of removal was improperly made, in a case where the party was not entitled to it, an application may be made to the federal court to dismiss it for want of jurisdiction. And they then seek to transfer to the latter class of cases the doctrines of the former,

and to hold that the jurisdiction of the state court ceases, and every step subsequent to the application for removal is equally as unauthorized and void in those cases where the order for removal is improper and the parties not entitled to it by law, as in the others.

Such a conclusion is in conflict with both classes of cases. Both proceed upon the express assumption that it is only where the removal is authorized by law, and the application properly made, that the jurisdiction of the state court is divested, and that of the federal court attaches. Both proceed upon the assumption that, where this is not the case, the jurisdiction of the state court remains, and the federal court acquires none whatever. And yet we are now asked to hold that, although this case may have been one of the latter class—though it may be one in which there was no law authorizing a removal, and in which, consequently, the federal court acquired no jurisdiction—yet, by some unaccountable process, the state court lost it, so that, between the two, the jurisdiction has lapsed entirely. Such a conclusion would be extraordinary indeed; and it has as little support in authority as it has in reason.

If there was no law authorizing the removal—and there was none, if either of the positions taken by the appellant is true—then the jurisdiction of the state court remained unimpaired, and there was no obstacle in the way of its exercise, except the erroneous order that the case be removed. And the idea that the appellate power of the state courts cannot be invoked to correct this error; that it remains in abeyance, suspended by such an unauthorized application; that the court which has jurisdiction must decline to exercise it until the court that has none shall see fit to disclaim it, is one that cannot be supported upon any reasoning. But if the right to appeal exists, in a case where the removal is unauthorized, then it must also exist even when the order of removal is proper. The question whether the court has power to hear and determine the appeal cannot depend upon the conclusion to which it may come on the merits of the order to be reviewed.

Nothing is better settled in legal practice than that an order by which a subordinate court dismisses a case for want of jurisdiction, or in any way divests itself of jurisdiction, is subject to review on appeal. It is within the express provision of our statute, that allows an appeal from any order which prevents a judgment from which an appeal might be taken. It is the common practice of all courts. The case of *The Mayor v. Cooper*, 6 Wall. 247, cited by the

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respondent, is one where the supreme court of the United States reviewed such an order made by the United States circuit court. It is true, in that case the order or judgment of dismissal was reverse: the court holding that the circuit court had jurisdiction. But, if they had held differently, they would have affirmed the order, and not have dismissed the writ of error. This is the invariable practice; and this shows that the exercise of the power to hear and determine an appeal from an order by which a subordinate court attempts to divest itself of jurisdiction, is not an assertion of jurisdiction in the case subsequent to and in defiance of the application for removal. It is merely the decision upon that application itself. And that decision, whether the power be exercised by a subordinate or appellate court, is not the exercise of jurisdiction in the case. It is the determination of an independent preliminary question, and one which every court, from the necessity of the case, has the power to determine whenever presented; and whoever invokes the exercise of this power, on the part of a subordinate tribunal of the state, must invoke it subject to all the conditions imposed upon that tribunal by the law of its existence; and one of those conditions is, that an order made upon such an application is appealable.

That the power to hear and determine an appeal from such an order is entirely independent of the question of jurisdiction to proceed upon the merits of the action, the case of *Nelson v. Leland et al.* 22 How. (U. S.) 48, is an express authority. A motion was there made to dismiss the appeal on the ground of a want of jurisdiction originally in the subordinate court. And the chief justice delivered the opinion of the court, "that the question of jurisdiction in the lower court is a proper one for appeal to this court, and for argument when the case is regularly reached, and that this court have jurisdiction on such appeal." The motion was therefore denied, and upon the express ground that their jurisdiction of the appeal was wholly independent of the actual jurisdiction of the lower court to try the action upon its merits. And, if this is so, the exercise of this appellate power is not the exercise of that jurisdiction of which it is claimed the state court is divested by the presentation of a proper application for removal. It is true that, if the appellate court should sustain the jurisdiction of the state tribunals, they might proceed subsequently to attempt to exercise it. But the mere determination of the question whether such jurisdiction has ceased or continued, is not an exercise of it, any more when made

by the appellate court than it was when made by the subordinate court.

Indeed, the right and the duty of the state courts to exercise such appellate power, has been expressly decided by the supreme court of the United States, in *Kanouse v. Martin*, 15 How. 198. The court of common pleas in the city of New York, had denied an application for removal, and afterward proceeded to try the action on the merits, and rendered judgment. It was taken by appeal to the superior court, which affirmed the judgment. And the supreme court of the United States reversed that judgment, on the ground that the superior court erred, not in taking jurisdiction of the appeal, but in neglecting to reverse the judgment of the common pleas for refusing the application for a removal. They say: "The error of the superior court was therefore an error *occurring in the exercise of its jurisdiction*, by not giving due effect to the act of congress under which the plaintiff in error claimed," etc. And it made an order remanding the case to the superior court, with directions for further proceedings in conformity to the opinion. And such further proceedings would consist wholly of an exercise of the appellate power of the superior court to reverse the judgment of the common pleas.

And yet we are referred to this case, by the respondent's counsel, to support their assertion that this court will "stultify itself by taking jurisdiction of this appeal."

This court certainly is not oblivious of the fact, that, if it should hold that a removal of this suit was unauthorized, and should subsequently proceed to render final judgment, after such further trial as may be necessary, the supreme court of the United States may assert its appellate jurisdiction over that judgment, may reverse it, and remand the case with directions similar to those in *Kanouse v. Martin*, as counsel suggest. But we feel very confident that, if it should do so, it will not be because this court erred in assuming jurisdiction of the appeal, but because it will think this court erred in holding the plaintiff not entitled to a removal. I have thus endeavored to state the distinction between the exercise of the power to decide upon the application for a removal, whether by the subordinate or appellate court, and the exercise of jurisdiction over the merits of the action, for the purpose of showing that the broad language used by the court in *Gordon v. Longest*, 16 Pet. 104, cannot, in any event, be applicable to the exercise of such appellate

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power. But, it is, perhaps, doubtful whether the same language would be now used by that court. The subsequent case of *Kanouse v. Martin* seems studiously to avoid it, and makes no suggestion that the judgments of the court of common pleas and of the superior court were void for want of jurisdiction, but speaks of them, throughout the opinion, as merely "erroneous." And the same view is also supported by the case of *Hadley v. Dunlap*, 10 Ohio St. 1.

I come, therefore, to the conclusion that this order is appealable, and that it is the duty of this court, from which it cannot shrink, to proceed to a determination of the questions presented.

Was the case within the provisions of the act of congress? The act provides that the non-resident party to a suit, in a state court, between a citizen of that state and a citizen of another state, shall be entitled to a removal, on making the proper application, "at any time before the final hearing or trial of the suit." The question arises upon this language, was the application here made, "before the final hearing or trial," in accordance with its intent and meaning?

What was its intent? I think it will not be claimed that the word "final," as used in this provision, applies to or qualifies the word "trial." The word "hearing" has an established meaning, as applicable to equity cases. It means the same thing in those cases that the word "trial" does in cases at law. And the words "final hearing" have long been used to designate the trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, and which are termed interlocutory. This use and meaning of the words is too well established and too familiar to require reference. I assume, therefore, that the meaning of the statute is the same as though these words were transposed, and it provided that the application might be made at any time "before trial or final hearing;" and that no implication can be raised, by attempting to apply the word "final" to the word "trial," that congress intended to distinguish between those trials which might only partially dispose of the case and such as might occur afterward, and to allow this right of removal, so long as any question yet remained to be tried, in order to the complete disposition of the suit. It will be observed that, in the act of 1866, of which this is amendatory, the words were so transposed, and the application was required to be made "before trial or final hearing,"

and their transposition in the present statute was evidently merely casual, not designed to effect, and not effecting, any change whatever in the meaning. The obvious intention of the statute was to require the party desiring to apply for a removal to do so before trial in actions at law, and, what is the same thing, before final hearing in actions in equity. The reason and justice of this, if a removal is to be allowed at all, are apparent. Only the non-resident can apply for it. And it would constitute the very essence of injustice to give him the right to experiment upon the decisions of the state tribunals, obtaining those which, if in his favor, would be binding and conclusive upon the other party, but which, if against himself, he could repudiate and take his chances again in a new tribunal. The statute did not intend to provide for any such wrong, but, on the contrary, clearly designed to exclude the possibility of it, by requiring the application to be made before trial or final hearing. It seems clear, therefore, that whenever in any state court there has been a trial in an action at law, or a final hearing in an action in equity, the result of which was an adjudication which, upon the principles governing judicial decisions, would be final between the parties as to any portion of the merits of the action, the case has passed beyond the stage where it was within either the letter or the spirit of this law.

How was it with this suit in that respect? It was an equitable action, brought in 1860, to foreclose a mortgage in the circuit court of Dane county. The defendant, in accordance with the practice prevailing in this state, interposed, by way of defense, certain counterclaims, growing out of and connected with the transactions in which the mortgage originated. To these there was a demurrer by the plaintiff, which was overruled, and the order overruling it was affirmed on appeal to this court. Various proceedings were subsequently had, and the case was then brought to final hearing, and a decree rendered in favor of the defendant, dismissing the complaint. That was reversed on appeal to this court, and another final hearing was had, in which the plaintiff obtained a judgment that was reversed by this court, and the cause remanded for further proceedings; and at that stage of it this application for a removal was made. It will be seen, therefore, that instead of being made before final hearing, it was not made until after there had been two final hearings. And it is no solecism to speak of two final hearings

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in an equity case any more than it is to speak of two trials in an action at law.

It is material, then, to consider what was the effect of the several decisions of this court in respect to the rights of the parties as to the matters involved in them. No doctrine is better settled here than that the matters decided became *res adjudicata*; those decisions became the law of the case, binding upon the parties, binding on the subordinate court, and disposing finally of the questions decided. Whatever further proceedings might be necessary to the ultimate disposition of the case, those questions were no longer open. *Luning v. The State*, 1 Ohand. 264; *Parker v. Pomeroy*, 2 Wis. 112; *Downer v. Cross*, id. 371; *Cole et al. v. Clarke*, 3 id. 323; *Jones v. Reed*, 15 id. 40.

If this rule were peculiar to this state, still the decisions of this court would govern as to the effect of our own judicial proceedings between the parties. But the same rule prevails everywhere. And it has been asserted by the supreme court of the United States quite as strongly as by any other tribunal. In *Martin v. Hunter's Lessee*, 1 Wheat. counsel raised a question as to the propriety of a former decision, the case having already been before the court on a former writ of error. On page 355 the court says: "In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formerly adjudged in this court, the same point was argued by counsel, and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties, and could not be re-examined." So it was held that the same rule prevailed in equity, and that a second appeal to that court brought up only the propriety of the proceedings in the court below, subsequent to the mandate on the first. *Hopkins v. Lee*, 6 Wheat. 113; In *Ex parte Sibbald*, 12 Pet. 492, that court said: "A final decree in chancery is as conclusive as a judgment at law. Both are conclusive of the rights of the parties thereby adjudicated." See also *Bridge Co. v. Stewart*, 3 How. 413; *Roberts v. Cooper*, 20 id. 480. It appears, therefore, that, by the principles universally recognized as applicable to the effect of judicial proceed-

ings, there had been several trials of this case, both in the subordinate and appellate courts of this state, and several judgments by the latter, which, so far as our judicial system is concerned, were final and conclusive between the parties, as to the questions decided.

It is true, those judgments did not finally dispose of the case. But that fact does not at all impeach their finality as to the matters disposed of by them. There are few important cases but what are carried more than once into the appellate courts. But the fact that the judgments of those courts do not, in the first instance, completely dispose of the case, has never been supposed to annul their effect entirely, and to place the case, when it got back into the subordinate court, precisely as it would be if there had never been any trial or appeal whatever. On the contrary, as the authorities above referred to fully show, when the case gets back into the inferior court, it carries with it the judgment of the superior, as the established law of the case, and no questions are open to further examination except those which that judgment has left open.

A trial or final hearing consists of the examination and determination both of questions of fact and law. In equity cases, the court may determine both. On appeal, this court may determine both. But the case may have been so presented that we could only properly determine the questions of law, leaving a further trial upon a part or all of the facts necessary for a complete adjustment of the controversy.

This was true in this suit. The struggle in the case was upon the questions of law growing out of the defendant's counterclaims. Those questions were fully considered and finally decided on the last appeal to this court, and the case was remanded for such further trial upon the questions of fact as was necessary to its final determination. And yet, after all these years of litigation, these repeated hearings and judgments both of the subordinate and appellate courts of this State, it is now claimed that this application for a removal was made "before trial or final hearing!"

If such had been the intention of congress, I cannot think it would have stopped where it did. If it would set aside and destroy the effect of repeated trials and judgments, why hesitate before the last one? If it would intervene, after all the most important questions in the case had been tried and passed into judgments, binding and conclusive on the parties, why pause before the fact that some

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question — perhaps a minor and unimportant one — still remained to be tried, in order to a complete disposition of the case? When tried, the judgment concerning it could be no more final, no more binding, than the previous judgments had been, as to the matters involved in them. Hence, if they were to be overthrown, why not overthrow the whole, and allow the party to remove his case, and try it anew in a court of original jurisdiction, after it was finally and wholly disposed of by the judgment of the state court? There could be no greater objection to the justice of such a law than there is to it, as it now stands, if it is to have the effect contended for. If the effect of two trials and judgments in all the state courts was to be annulled, there could be no reason why the same thing should not be done as to three, or any other number necessary to dispose of the case.

But the act furnishes no evidence of such intention. On the contrary, both its letter and spirit exclude it. The law had formerly allowed only non-resident defendants to apply for a removal; and they were required to be prompt, and to make their election at the outset, and before taking any steps which could be construed into a voluntary submission to the jurisdiction of the state court. This act designed to extend the right to non-resident plaintiffs as well. It designed to extend the time, so that the application might be made at any time before trial or final hearing. But it did not design to go so far as to allow the party actually to submit his case to the judgment of the state court on the merits, and then, if its judgments should be against him, but should not happen to finally determine the case, to exercise his right of removal. To induce a court of justice to infer a design to effect such an object, to borrow the language of Chief Justice MARSHALL, "the intention should be expressed with irresistible clearness." But here, so far from that being the case, congress has explicitly required that the application shall be made "before final hearing or trial." And the spirit and object of the act unite with its letter in conducting imperatively to the conclusion, that its meaning was to require it to be made before the party had voluntarily submitted his case to any trial or final hearing whatever in the state court.

Not is this conclusion at all impeached by the rule that has been established by the federal and other courts, under statutes authorizing appeals, or writs of error, from final judgments or decrees. It is generally held there, that the decree or judgment must be one

purporting a full and final disposition of the case, and not, on its face, reserving a part of it for future decision by the court; yet even in those cases, the rule has not been held with unreasonable strictness, but those decrees which substantially dispose of the merits of the controversy are held final, so as to allow an appeal, although some matters essential to a complete execution of the decree are reserved for further examination and decree. Thus, in *Forgay v. Conrad*, 6 How. (U. S.) 201, a decree was passed disposing of the general merits of the action, but directing an account of rents and profits, and reserving that subject for further decree. A motion was made to dismiss, on the ground that the decree was not final. The court said: "The question upon the motion to dismiss is, whether this is a final decree, within the meaning of the acts of congress. Undoubtedly it is not final within the strict technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." See also *Bronson v. Railroad*, 20 How. 524, 531. But even if, under this class of statutes, it were held that the decree or judgment must be absolutely final to authorize an appeal, no argument could be drawn from it by analogy against the conclusion already arrived at. The difference in the objects of the two statutes would at once furnish an answer. The one is designed to regulate the exercise of an appellate jurisdiction, by which the judgments of an inferior tribunal may be reviewed. It is natural, in such case, to require the inferior court first to dispose, substantially, at least, of the whole case, before the appellate power could be invoked. But the object of the other statute was not to provide for a review of the decisions of an inferior tribunal, but for the exercise of an election, by a party to a suit in a state court, to transfer it to another court of original jurisdiction, for trial. The design was to authorize an election between the two, not to give him a chance at both. And this object can only be accomplished by requiring, as the statute does, the application to be made before any trial or final hearing in the case. The object of the one statute was to prevent an appeal until every thing had been decided. The object of the other was to authorize a removal only before any thing had been decided.

It seems to me clear, therefore, that this case was not within the act of congress, and that the order for removal was unauthorized.

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I am aware that the learned judge of the district court of the United States for this district has reached a different conclusion. His opinion upon the subject is published in the April number of the Law Register. Upon this point he says: "If the cause had been finally determined, by either judgment of the circuit court or by the order of the supreme court, then the application for removal would not have been filed before the 'final hearing or trial.' But the last order of the supreme court, reversing the judgment of the circuit court, and remanding the cause to that court for further proceedings according to law, opened the whole case to litigation, *the same as if no judgment had ever been rendered*. The supreme court, in effect, ordered a *venire facias de novo*, which required the circuit court to hear the cause as if no hearing or trial had taken place." If this is so, then this court has been laboring under a great delusion. If, after a case has been three times in this court, twice on appeal from final judgments in the court below; if, after the essential, vital, legal questions upon which its decision depends have been solemnly adjudicated by this court, and the cause remanded to the circuit, it starts there anew, with nothing settled, "the whole case opened to litigation as if no judgment had ever been rendered," then are not only our labors fruitless indeed, but those of the unfortunate litigants in the state courts are vainer than the labors of Sysiphus.

We have not so understood the law. We have uniformly applied to our decisions, so far as relates to matters within our jurisdiction, the same rule which the supreme court of the United States applies to its decisions; and have held that they become the law of the case, binding on the parties and the subordinate courts, and that the questions decided are not open to further litigation. We cannot have erred in this, unless the decisions of this court constitute an exception to the rule by which those of all other courts are governed.

I cannot but regret that this difference of opinion has arisen between this court and the learned judge of the district court. It may be the cause of much embarrassment and expense to the parties. But, inasmuch as the difference does exist, I know of no way to avoid its consequences, whatever they be. There seems but one course open to this court, consistent with its duty to itself and to the state, where its appellate power is invoked in the regular course of judicial proceedings; and that is, to exercise the jurisdiction which it believes itself to possess, according to its best judgment, whether that be well or ill-founded.

As the conclusion already arrived at makes it unnecessary, I shall not enter upon the question whether it is competent for congress to authorize a non-resident plaintiff, who has voluntarily brought his suit in the state court, to obtain a removal. I will only say that there is a marked difference between such a law and that which has heretofore been in force. The appellate jurisdiction of the United States supreme court over the state courts, has been sustained by the decisions of that court, and generally acquiesced in. And the validity of the twelfth section of the judiciary act, authorizing a non-resident defendant sued in a state court to have the case removed for trial to the federal courts, has also been sustained, as an alleged branch of the appellate power. But the argument by which a proceeding, apparently so incongruous as one by which the courts of original jurisdiction in one judicial system wrench a case bodily from the courts of original jurisdiction of another distinct judicial system, created and organized under another constitution of government, is attempted to be sustained, is not that there is any express provision in the constitution of the United States to that effect, but that the proceeding is necessary in order to give effect to the general grants of judicial power which it contained. It is said that, as questions may arise concerning the constitution and laws of the United States, in suits pending in the state courts, and as citizens of other states may be sued as defendants in those courts, and as the judicial power of the United States extends to such controversies, unless there is a right of appeal and of removal, there is no way in which that judicial power can reach such cases. The argument rests, therefore, almost entirely on the assumed necessity of such right, in order to give effect to the grants of judicial power. Powerful arguments have certainly been made against the existence of the right in any case. These have been drawn from the acknowledged independence and sovereignty of the state and federal governments, each within its own sphere, which doctrine has often been asserted by the supreme court of the United States. They have expressly told us that this separation of the two governments is so complete that congress can vest no part of the judicial power of the United States in any state court, and can impose no duty whatever on any state officer. In view of these conclusions, it is certainly difficult to show, by any satisfactory reasoning, by what authority congress can authorize a federal court to acquire original jurisdiction through the process and pro

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ceedings of a state court. These considerations, joined with the fact that, by the ordinary rules of interpretation, the general grants of judicial power, original and appellate, in the constitution of the United States, would, in the absence of any professed intention on its face to regulate any other judicial system, be held to relate solely to the judicial system established by itself, have led many able minds to deny the existence of any power whatever to transfer a case, by appeal or otherwise, from a state to a federal court. But against these arguments the power has been upheld, as already remarked, upon the ground of its absolute necessity in order to give effect to the grants of judicial power. But, if the power rests upon that ground, the necessity which gives it birth would seem to constitute its limit. And, in respect to a non-resident plaintiff, who voluntarily brings his suit in a state court, that necessity fails entirely. A right of removal is not necessary there to enable the judicial power of the United States to reach the case; because he might have brought the suit in the federal court in the first instance. The constitutional grant had full effect from the outset, and the party, in whose behalf the right to have the case tried in the federal court is claimed, had it fully provided for him. Whether, after he voluntarily waived it, and sued in the state court, there is any power to provide for a removal of the suit in his favor, is certainly a different question from any that has yet been decided by the supreme court of the United States.

There is at least some ground for denying the powers in such a case, without impeaching the right of appeal and removal, so far as they have already been sustained; whether, upon full examination, this ground would be found sufficient, I shall not attempt further to inquire. But I will say, that, if this act is to have the effect claimed for it; if, after a non-resident has pursued a citizen of this state through years of expensive litigation in the state courts; if, after all the important and vital questions in the case have passed into judgment, as between the parties, and he sees his antagonists about to pluck the fruits of his toil and sacrifice,—he can, by an affidavit under this statute, turn those fruits to ashes, and transfer his case to another court of original jurisdiction to start anew, certainly such results will challenge for the act the closest scrutiny of the grounds upon which the power to pass it is asserted.

Order reversed and cause remanded.

Fuss, appellant, v. Fuss *et al.*

(24 Wis. 262.)

Post-nuptial contracts. Change of domicile. Future acquisitions.

Where there is a marriage between parties in a foreign country, and a post-nuptial contract entered into respecting their property, which contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions.

The plaintiff, Anna Maria Fuss, and the testator, John W. Fuss, both then residents and citizens of Prussia, were married in that country prior to the 14th of November, 1841. On that day they duly executed, according to the law of Prussia, a valid post-nuptial contract in writing, whereby each granted and transferred to the other all real and personal property which should belong to the grantor on the day of his or her death. At that time the plaintiff owned real estate in Prussia of the value of some \$1,500, over which, according to the laws of that kingdom, she had full control and the right of disposal. In 1844 the plaintiff's property was sold, and the husband took possession of the proceeds. The parties then removed to Wisconsin, where the husband purchased a farm, paying the proceeds of the plaintiff's estate in Prussia as part of the purchase-money. He afterward acquired other property, by devise and otherwise, and in 1864 died, leaving a will, by which he gave all his real and personal property to his wife, during her life, and, after her death, to his brothers and sisters, the defendants.

This action was brought for a decree declaring valid the post-nuptial contract, awarding specific performance of the same, and that the defendants relinquish their claim under said will. Judgment was rendered for the defendants, from which the plaintiff appealed.

James S. Brown and Edward Salomon for appellant.

Levi Hubbell for respondents.

DIXON, C. J. Judge STORY, in his Conflict of Laws (§ 143), speaking of contracts between husband and wife in respect to their

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property, says: "Where there is an express nuptial contract, that, if it speaks fully to the very point, will generally be admitted to govern all property of the parties, not only in the matrimonial domicile, but in every other place, under the same limitations and restrictions, as apply to other cases of contract. But where there is no express nuptial contract at all, or none speaking to the very point, the question, What rule ought to govern, is surrounded with more difficulty." The learned commentator then proceeds to examine the question at much length, quoting the opinions of eminent jurists, both at home and abroad, and concludes (in §§ 184, 185, 186 and 187) by laying down, among others, the following propositions, which, he says, although not universally established or recognized in America, have much of domestic authority for their support, and none against them:

"(1) Where there is a marriage between parties in a foreign country, and an express contract respecting their rights and property, present and future, that, as a matter of contract, will be held equally valid everywhere, unless, under the circumstances, it stands prohibited by the laws of the country where it is sought to be enforced. It will act directly on movable property everywhere. But as to immovable property in a foreign territory, it will, at most, confer only a right of action, to be enforced according to the jurisprudence *rei sitæ*.

"(2) Where such an express contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions.

"(3) Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle that movables have no *situs*, or, rather, that they accompany the person everywhere. As to immovable property, the law *rei sitæ* will prevail.

"(4) Where there is no change of domicile, the same rule will apply to future acquisitions as to present property. (5) But where there is a change of domicile, the law of the actual domicile, and not of the matrimonial domicile will govern as to all future acquisitions of movable property; and, as to all immovable property, the law of *rei sitæ*."

Murphy's Heirs v. Murphy, 1 La. Cond. 341, is an adjudication illustrating and fully sustaining the first proposition laid down

by Judge STORY. There was an express contract respecting the rights and property of the parties, even though they should afterward reside in countries where different laws should prevail.

Castro v. Illies, 22 Texas, 479, is an authority which, in like manner, illustrates and sustains the second proposition, as also the others; and the doctrines of that case are supported by the decisions in *Le Breton v. Mills*, 8 Paige, 261; *Gale v. Davis's Heirs*, 1 La. Cond. 312; and *Saul v. His Creditors*, 5 Wharton (N. S.), 569, 604, 605. The opinion of Judge PORTER, in the latter case, is a very full and able discussion of the questions.

Speaking of the decisions in Louisiana, Judge Story (§ 183) says the doctrines there maintained will, most probably, form the basis of American jurisprudence on this subject; that they have much to commend them in their intrinsic convenience and certainty, as well as in their equity; and they seem best to harmonize with the known principles of the common law in other cases. This case falls clearly within the second proposition above laid down. There is nothing in the contract which "speaks fully to the very point;" nothing which manifests any intention in the parties to regulate or control by it, and, according to the laws of their matrimonial domicile, their future acquisitions and gains of property in any foreign state or territory, or any property which should be held or owned by them in such state or territory. The contract was obviously made with reference to its operation and effect, within the kingdom of Prussia, upon the property of the parties situated there, and with no reference to property situated elsewhere. It appears that they had no property elsewhere, and there is no ground for supposing that they at that time contemplated any change of domicile, or a removal to this country or any other. The contract, to have operated upon the rights of the parties abroad, must have been made with express reference to such operation. The real property, therefore, in this state, acquired by the parties after they came into it, and which was held and owned by the husband in his own name, was subject to be disposed of by him, by will or otherwise, according to the laws of this state.

The other point urged, as to the equity of the plaintiff to maintain this action, because the lands in question were purchased with the money of the plaintiff, or the proceeds of her estate in Prussia, is sufficiently answered by the fact, that under the will she has all the real and personal estate whatever of the testator, her deceased

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husband, during her life-time. There is no pretense that such is not a full and ample provision for her support and maintenance; and, this being so, she has no ground of complaint.

Judgment affirmed.

COOK v. CITY OF MILWAUKEE, appellants.

(24 Wis. 370.)

Snow and ice on sidewalk—liability of city for.

Mere slipperiness arising from a smooth surface of snow and ice on a sidewalk is not such a defect or want of repair as will render a city liable in damages for injuries sustained from a fall thereon.

Where the gutters in a street are insufficient to carry off an unusually large quantity of water accumulated by artificial means, and the water overflows upon the walk and renders it slippery, the city will not be liable for injuries sustained thereby, unless it should appear that it was guilty of some subsequent negligence or default in not repairing the sidewalk thus rendered dangerous; or unless it be shown that the gutter was in such condition that the dangerous consequences to be apprehended from an overflow of the water were apparent.

ACTION to recover damages for injuries sustained by the plaintiff from a fall on the ice on the sidewalk of the defendants. The plaintiff alleged that the defendants had suffered the snow which had fallen on said walk to remain to be trodden down hard, and that they had permitted the gutters along the walk to become so filled and obstructed as not to be able to carry off a quantity of water which had been pumped into the street by fire-engines belonging to the defendants, and that said water overflowed the gutter unto the trodden snow on the walk, and "became congealed and frozen therewith, and did form a solid mass of ice on and over the entire surface of said stone," rendering it unsafe for pedestrians; of all of which facts the defendant had notice.

The defendant demurred, for insufficiency of facts, etc., and from an order overruling the demurrer brought this appeal.

D. G. Hooker, for appellant.

Jenkins & Elliott, for respondents.

DIXON, C. J. The complaint does not charge that the snow which had fallen and was suffered to remain and be trodden down by the

foot-passengers, constituted an obstruction, or was in a rough and uneven condition, so as to be unsafe or dangerous to persons walking on the side and cross-walk, and using due care. It does not charge that the walk was not properly and well constructed, or that there was any defect or insufficiency in the manner of placing the stone across or over the gutter. The only defect claimed of in this particular is, that the walk over the stone was slippery because of the smooth surface of the snow and ice which had accumulated upon it. That such a condition of the walk, arising from such a cause, is not an insufficiency or want of repair which will make the city liable in damages, under a statute like ours, was decided by the supreme court of Massachusetts in *Stanton v. Springfield*, 12 Allen, 566, and in *Hutchins v. Boston*, and *Johnson v. Lowell*, immediately following in the same report; and also in *Nason v. City of Boston*, 14 id. 508. Upon this point we are content to refer to those cases, being abundantly satisfied, for the reasons given in the opinion in the first case, that they hold the correct rule of law in relation to it.

If, however, ice or snow is suffered to remain upon a sidewalk in such an uneven and rounded form that a person cannot walk over it, using due care, without danger of falling down, that, it seems, does constitute a defect for which the city or town will be liable. *Luther v. Worcester*, 97 Mass. 268; *Hutchins v. Boston*, id. 272. See, likewise, *Hull v. Lowell*, 10 Cush. 260; *Shea v. Lowell*, 8 Allen, 136; *Payne v. Lowell*, 10 id. 147; *Providence v. Clapp*, 17 How. 164.

As to the other charge in the complaint, that the gutter was permitted to become and remain so filled and obstructed by divers substances that it could not, and did not, carry off the water which was pumped from the river upon the street above it, by the wrongful use of the steam fire-engines, but that the same was thereby forced from the gutter, and caused to flow across the street, and on to the snow which was beaten and trodden down upon the stone, where, becoming congealed and frozen, it formed a solid mass of ice over the surface of the stone, we are of opinion that enough is not stated to show a cause of action upon this ground. It is not averred when the gutter became obstructed, or how long it had remained so. The nature of the obstruction is not set forth. It does not appear that the condition of the gutter was such, from that cause, that it would not have discharged and carried off all the water flowing or accumulating there from natural causes. If it was in a condition to have done this, then, we think, the city ought not to be held

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responsible for the consequences of such an extraordinary occurrence as the wrongful pumping upon the street of a large quantity of water, or the wrongful accumulation of water there by other artificial means, unless it should appear that it was guilty of some subsequent negligence or default in not repairing the sidewalks which had thus become impassable or dangerous for travelers. To hold that the city, in order to obviate the liability imposed by the statute, is bound at all times to keep the gutters in such condition as that they will carry off water thus unlawfully thrown upon the streets, would, in our judgment, be requiring a degree of care and watchfulness altogether unreasonable, and not contemplated by the legislature. If liable at all, by reason of such unusual and unlawful acts, it can only be when the gutters are shown to have become and remained wholly obstructed, or in such condition that the dangerous consequences to be apprehended from the overflowing of water were apparent.

Order reversed and cause remanded.

MCLEAN, appellant, v. BOVEE.

(34 Wis. 205.)

Crop planted after commencement of action for ejectment.

One who recovers land in an action of ejectment is entitled to the crops planted after the commencement of that action.

APPEAL from a judgment for the defendant.

Gillet & Pier, for appellant.

E. S. Bragg, for respondent, cited *Doe ex dem. Upton v. Wetherwicke*, 3 Bing. 11; *Hodgson v. Gascoigne*, 5 B. & A. 88; 8 Wend. 584; *Adams on Ejectment*, 416.

PAINE, J. The defendant in this suit recovered certain premises of the plaintiff in an action for the recovery of real property. He was put in possession under the judgment, and took possession of a crop of wheat, part of which had been cut, and a part of which was still uncut at the time he took the land. This action was

brought to recover for this taking of the wheat, and the question is, which of the parties was entitled to it?

The authorities cited by the respondent's counsel seem to show that, upon the facts here presented, the crop belonged to the defendant. It was sowed long after the suit to recover the land was begun, and there is no fact upon which the case can be taken out of the rule they establish.

Judgment affirmed, with costs.

OTT, appellant, v. RAPE and another.

(23 Wis. 326.)

Sale of land under execution. Waiver of right by purchaser.

Where the holder of a sheriff's certificate of sale accepts a part of the purchase-money for which the land was sold, from the debtor, he waives his right to enforce a forfeiture of the equity of redemption, and converts his interest into a mere lien.

APPEAL from judgment of circuit court for defendants, in an action of ejectment against Rape and Gilbert.

In 1865 the land in question was sold by the sheriff under an execution upon a judgment against Rape in favor of Ott. Ott bid off the property and received the usual certificate of sale. Rape, in 1866, paid Ott a part of the amount of the judgment, and took a receipt, which stated that the sum was "received on account of sheriff's certificate, in favor of George V. Ott." In 1867, Ott obtained a sheriff's deed of the land sold, on which his claim in this action was based. About the same time Rape, who was in possession, sold the land to Gilbert for a valuable consideration.

H. W. and D. K. Tenney, for appellant.

Spooner & Lamb, for respondent.

DIXON, C. J. In this case we unhesitatingly adopt the conclusion of the court of appeals of Kentucky, under like circumstances (*Southard v. Pope's Executor*, 9 B. Monroe, 264, 265), and hold that

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the plaintiff, by accepting a part of the purchase-money for which the land was sold, waived his right to enforce a forfeiture of the equity of redemption according to the terms of the certificate of sale, which he held, and thereby converted the certificate, and his interest in the land under it, into a mere lien or security for the payment of the balance of the purchase-money.

Judgment affirmed.

CURTIS'S ADMINISTRATOR v. WHIPPLE *et al.*, appellant.*

(24 Wls. 280.)

Taxation for private purposes.

An act of the legislature, authorizing a town to raise by tax a sum of money for the use and benefit of a private educational institution, is unconstitutional and void.

The fact that an educational institution is incorporated does not render it public, so far as relates to the power of taxation for its aid.

APPEAL from a judgment of the circuit court for the plaintiff, in an action for the wrongful taking and conversion of property.

The facts are as follows: By an act of the legislature (Priv. and Local Laws, 1867, ch. 381), the town of Jefferson was authorized to raise by tax the sum of \$5,000, to aid in the erection of buildings for the "Jefferson Liberal Institute" in said town, provided a majority of the votes cast at a special town meeting to be held should be in favor of said tax. The town meeting having been held, and a majority of the votes being in favor of the tax, the supervisors caused the tax to be assessed, and the defendant Whipple, as town treasurer, proceeded to collect the same. The plaintiffs' intestate having refused to pay the tax assessed on him, the property in question was seized and sold by the said Whipple.

* The principles involved in the following case are of such general importance as to take it out of the class usually denominated "local cases."—REp.

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The supervisors of the town were included as defendants. Whipple justified under his warrant, and the facts above set forth.

Gerrit T. Thorn, for appellants.

Enos & Hall, for respondent.

DIXON, C. J. The counsel for the plaintiff correctly state the effect of the act of incorporation (Pr. and Local Laws of 1866, ch. 516), when they say that the "Jefferson Liberal Institute," for the benefit of which the taxes in question were attempted to be assessed and collected, is essentially a private educational institution, controlled exclusively by the stockholders through a board of trustees. The town of Jefferson is not a stockholder, and has no voice in its management. The tax payers in the town, as such, are not stockholders, and have no privileges in the institution that are not common to all the people of this or any other state. The trustees may exclude any or all of the citizens of the town from the institution. The money, when collected, is to be paid to the treasurer of the institute, and the town is not secured the right to see or know that it is expended for the purposes for which it was collected. Under these circumstances we feel no doubt in saying that the act (Pr. and Local Laws of 1867, ch. 381), and its amendment (Pr. and Local Laws of 1868, ch. 9), under which the proceedings to levy and collect the supposed tax are attempted to be justified, are unconstitutional and void. It strikes us, "at the first blush," that this is not the levy and collection of money for public purposes, as clearly as if the institute were not an incorporated body, but a mere association of private individuals resolved upon the establishment of a like institution. If it were such an institution, or a grammar or classical school, or a seminary built up and established by individual enterprise, or by persons engaged in the profession of teaching, or by others, and owned and controlled by those contributing toward it, and the emoluments belonging to them, we apprehend that no one would contend that the people of Jefferson might be taxed for the purpose of donating the money to it. The fact that it is an institution incorporated by act of the legislature, does not change its character in this respect. It is but a most frivolous pretext for giving to a corporation, where there is no certain and definite personal responsibility, money exacted from the tax payers, which

a just and honorable man engaged in the same business would hesitate to receive, though paid without opposition, and to enforce the payment of which, against the will of the tax payers, he would never think of resorting to coercive measures, provided the same were unlawful. It can no more be supported by taxation than if it were unincorporated, or a private school or seminary of the kind above supposed. Nor will the location of the institution at Jefferson, and the incidental benefits which may thereby arise to the people of the town, sustain the tax. That is not the kind of public benefit and interest which will authorize a resort to the power of taxation. Such benefits accrue to the people of all communities from the exercise in their midst of any useful trade or employment, and the argument, pursued to its logical result, would prove that compulsory payment or taxation might be made use of for the purpose of building up and sustaining every such trade or employment, though carried on by private persons for private ends, or the purposes of mere individual gain and emolument. That there exists in the state no power to tax for such purposes, is a proposition too plain to admit of controversy.

Such a power would be obviously incompatible with the genius and institutions of a free people; and the practice of all liberal governments, as well as all judicial authority, is against it. If we turn to the cases where taxation has been sustained as in pursuance of the power, we shall find in every one of them that there was some direct advantage accruing to the public from the outlay, either by its being the owner or part owner of the property or thing to be created or obtained with the money, or the party immediately interested in and benefited by the work to be performed, the same being matters of public concern; or because the proceeds of the tax were to be expended in defraying the legitimate expenses of government, and in promoting the peace, good order and welfare of society. Any direct public benefit or interest of this nature, no matter how slight, as distinguished from those public benefits or interests incidentally arising from the employment or business of private individuals or corporations, will undoubtedly sustain a tax. In thus endeavoring to define how the public must be beneficially interested, in order to justify the raising of money by taxation in cases like the present, we, of course, do not intend to include all the purposes for which money may be so raised. Taxes may be levied and collected for charitable purposes, but these constitute a

peculiar ground for the exercise of the power, which does not exist here. So, claims founded in equity and justice in the largest sense, and in gratitude, will support a tax. Such claims, however, and we think all others, where taxation is proper, except claims founded in charity, may be referred to the general principle above spoken of, of public interest in, or benefits received by, the transactions out of which the claims arose. And these principles will be found to have been always recognized and acted upon by this court, whenever the question has arisen. *Knowlton v. Supervisors, etc.*, 9 Wis. 410; *Soens v. Racine*, 10 id. 271; *Brodhead v. Milwaukee*, 19 id. 624; *Hasbrouck v. Milwaukee*, 13 id. 37.

These remarks sufficiently answer the argument of counsel for the defendants, when he says that this tax should be sustained, because special taxation in the towns and cities where the state normal schools have been located, is, or has been, sustained for the purpose of raising funds to procure suitable grounds, and to erect proper buildings for those schools. Conceding such taxation to be regular and valid, still the difference between the two cases is so marked and plain as to require no effort to distinguish them.

The state normal schools are public, not private, schools, and the grounds, buildings, fixtures and apparatus belong to the public, and not to private individuals or corporations. Hence, if taxes have been levied and collected to aid in the construction of buildings or the purchase of grounds, it was not taxation for merely private purposes, as is the case here.

In conclusion, we refer to the *Philadelphia Association, etc., v. Wood*, 39 Pa. St. 73, as a decision sustaining the principles enunciated in this opinion.

Judgment affirmed.

SOMERS, plaintiff in error, v. SCHMIDT.

(24 Wls. 417.)

When judgment of eviction concludes warrantor.

In an action on a covenant of warranty in a deed of land, brought against the warrantor, after a judgment of eviction against the warrantee, the warrantor is not concluded from showing title in himself, unless he had due notice of the ejectment suit.

To have the effect of depriving the warrantor of the right to show title, the notice should be from the warrantee, should be unequivocal, certain and explicit, should request the warrantor to defend the title, and should be given in time to enable him to prepare for such defense.

Knowledge of the action and a notice to attend the trial is not enough to work an estoppel.

ERROR to circuit court in an action to reverse a judgment. The facts appear in the opinion.

Jay Mayham, for plaintiff in error

Israel Holmes, for defendant in error.

DIXON, C. J. The action in the court below was by *Schmidt* against *Somers*, to recover damages for the alleged breach of a covenant of warranty contained in a deed of land executed by the latter to the former. *Schmidt* showed an eviction in pursuance of a judgment in a suit in equity for the sale of the land to satisfy a vendor's lien. That suit was brought by one Christian Sauer, a former owner of the land, who had conveyed it to one Jacob Sauer, by whom it was afterward conveyed to *Somers*. The suit was against Jacob Sauer and *Schmidt*. *Somers* was not a party to it; and the question here is, whether he received such notice of its commencement or pendency as will make the judgment conclusive against him in the action upon his covenant. It is not pretended that *Schmidt* ever gave him any notice whatever, either written or verbal, of the commencement or pendency of the suit. *Schmidt* testified on the trial that he did not. It appears, however, that *Somers* did have knowledge of its pendency through the other defendant in it, Jacob Sauer, who called on him the day before the commencement of the

term of court at which the judgment was rendered, and requested him to attend as a witness. He did so attend, and was present at court during a part of the term, and heard some conversations with attorneys about the suit, but was not present at the trial. It would seem that Jacob Sauer undertook to defend the suit, but that his co-defendant, *Schmidt*, did not, but allowed judgment to go against him by default. He was not at the court, nor present at the trial. The defense of *Somers* to the action upon the covenant is, that he had no knowledge or notice of the existence of the vendor's lien at the time he purchased and paid for the land, and, consequently, that it constituted no lien as against him or his grantee, and no breach of the covenant; and the question is, whether, upon the facts above stated, he had such notice of the suit to enforce the lien as that he ought to be concluded by the judgment, or deprived of the right to show that the lien, if it once existed, had been cut off by a conveyance of the land, and then constituted no incumbrance upon it. In *Paul v. Whitmore*, 3 Watts & Serg. 410, it was held that "to have the effect of depriving the warrantor of the right to show title, the notice should be unequivocal, certain and explicit; a knowledge of the action, and a notice to attend the trial, will not do, unless it is attended with an express notice that he will be required to defend the title."

This language is quoted with approbation by that able writer, Mr. Rawle, in his work on covenants, page 244, and the authorities upon the subject very fully collected and examined; and although his conclusion may not be that notice in writing is necessary in order to bind the warrantor by the judgment, yet it very clearly is, that it should in all cases come from the warrantee or party relying upon the covenant, or be given under his direction or authority, and should be to the effect that the warrantor is required to defend the title. In *Minor v. Clark*, 15 Wend. 425, it was held by a majority of the court, that a verbal notice of the suit to the grantor, with a request to him to attend to the defense, was sufficient. Such is undoubtedly the rule which has been held in all cases of this nature; and we know of none where it has been decided that notice *auribus*, or mere knowledge by the suit incidentally acquired through third parties, was sufficient; and the rule is a reasonable and just one. It requires no more of the warrantee or tenant in possession than he ought to be willing to perform, if he desires to charge the warrantor with the effect of an estoppel by judgment. It is in harmony

with the principle upon which such estoppels rest. The warrantor, being notified of the suit, and having the defense tendered to him so far as it may be necessary for him to establish his title, if he had one, becomes a *quasi* party to the suit, has his day in court, and ought to be concluded by the judgment. But without such notice and a request to defend, he has no such opportunity, and ought not to be estopped. And when we consider this principle upon which the judgment is held conclusive against the warrantor, and the rule which almost universally prevails in judicial proceedings, that notices must be in writing, it would seem that Judge BRONSON was not so very far wrong in *Miner v. Clark*, when he insisted that this also should be written. And especially would this seem proper where it is held, as it has been in some of the states, that notice to the warrantor in his life-time is sufficient to bind his legal representatives after his decease, without the giving of further or other notice to such representatives. This was so held in *Brown v. Taylor*, 13 Vt. 631; but the notice there was in writing. But as it appears to be settled that verbal notice is sufficient, we are not disposed to depart from that rule, though we might wish, for the sake of greater convenience and certainty, that it had been otherwise established.

If, on the other hand, upon mere knowledge of the suit, however acquired, the warrantor would be authorized to come in and assume to conduct the defense, so far as the proof of his own title was concerned, there might be some reason for holding him bound by such knowledge. But, without the assent of the defendant in the suit, he has no such authority. It is *res inter alios acta*, and, if he should apply to the court for permission to defend, the defendant not having voluntarily offered it, the answer would be that he had no occasion to do so, since his rights could not be affected by the judgment.

In making these observations, we are fully aware that there is a class of cases of another kind to be found in the books, in which a somewhat different and more liberal doctrine with respect to notice seems to prevail. *Chicago City v. Robbins*, 2 Black, 423, and cases there cited are instances. It is held, in those cases, that express notice to defend the suit is not necessary. It will be found in all of them, however, that the notice of the suit was given by the party seeking to take advantage of the judgment, or by some person properly representing him. Thus, in *Chicago City v. Robbins*, the notice was by the city attorney, who applied to *Robbins* to assist him in

procuring testimony. *Robbins* did so, wrote to a witness, and was notified by the city attorney when the trial was to take place. But it is enough to say of those cases, that they were none of them actions upon the covenants contained in the deed, and that the rule laid down in them has never been applied to an action of that kind. They are not referred to by Mr. Rawle, although some of them are of quite an early date, and evidently because he considered them inapplicable. Neither do we find them referred to by the courts in cases where the question has been up as to the sufficiency of notice to bind the covenantor in a deed, although they were decided by the same courts by which this question has been so fully settled. Our conclusion, therefore, is, that the doctrine of those cases is inapplicable, and ought not to govern in an action like this.

But if the notice in this case were otherwise good, it was clearly defective in having come to the plaintiff in error too late. Notice, when given by the grantee himself, must be seasonable. The object being to enable the warrantor to come in and defend his title, the notice should be given at or before the return of process, or at least before the expiration of the time to plead or answer, and so that he may have reasonable time to prepare for the defense. It does not appear that the knowledge acquired by the plaintiff in error at that late day was, or could have been, of any avail to him, and the inference must be that it was unavailing. On this point see *Davis v. Wilbourne*, 1 Hill (S. C.), 28, cited in note to Rawle on Covenants, *supra*.

It follows from these views, that the learned judge who presided at the trial was in error, both in the instructions which he gave to the jury and in those which he refused. He should have given those asked by the counsel for the plaintiff in error, numbered one and two in the bill of exceptions,* and should not have given those numbered four, five and six, to which the plaintiff in error excepted. †

Judgment reversed and a venire de novo awarded.

* The following are the instructions referred to: 1. That unless *Schmidt* gave notice to *Somers* of the pendency of the suit brought by Christian Sauer against *Schmidt* and Jacob Sauer, the judgment in that action is not conclusive against *Somers*. 2. That such notice should have been given within a reasonable time after the commencement of the action, and more than one day prior to the term of court at which the action was tried.

† These were as follows: 4. That it was not necessary that *Somers* should have had from *Schmidt* any formal notice, either written or verbal, of the action brought by Christian Sauer, any length of time prior to the rendition of the judgment, to make the same conclusive against him. 5. That if *Somers* had constructive notice or actual knowledge of the existence of that suit at a reasonable time prior to the rendition of the judgment, the same is conclusive upon him. 6. That if he had actual knowledge of the pendency of that action, at a reasonable time prior to the trial thereof, the judgment was conclusive upon him.

Rice v. Roberts.

RICE and another, appellants, v. ROBERTS.

(24 Wla. 461.)

Statute of frauds — Oral agreement as to manner of building — Party wall. — Revocation of license.

An oral contract between the owners of adjoining lots, limiting the use which one of them should make of his lot, or the manner in which he should build upon or occupy it, is within the statute of frauds, and therefore void.

The sale and conveyance of land by the owner amounts to a revocation of an oral agreement between him and an adjoining owner, whereby the latter was to build on the line between the lands a party wall, and the former was to pay one-half the cost thereof, provided the adjoining owner has notice of the sale, and has not at the time commenced the erection of the wall.

APPEAL from a judgment of nonsuit.

The action was brought to recover one-half the cost of a party wall built by the plaintiffs on the line between their lot and an adjoining lot formerly owned by the defendant; and also to recover damages for breach of an alleged agreement between plaintiffs and defendant, that any building erected by the latter on his lot should not project farther in front than the building erected by the plaintiffs. The following facts were disclosed by the evidence: The defendant, while negotiating with the former owner of the lot adjoining the plaintiffs', for its purchase, and when about to purchase it, made a verbal agreement with the plaintiffs, whereby the latter were to build on the line between the two lots a party wall, one-half the cost of which the defendant agreed to pay whenever it was used; and he further agreed to set his building, when he should build, three feet back from the street, to correspond with the plaintiffs' building. This agreement was to bind the defendant's heirs and assigns, and was to be put in writing "at the earliest opportunity." The defendant purchased the lot, and soon after, and before the plaintiffs had begun to build the wall, sold it to one Strickland, without any reservation. Strickland afterward erected a wooden building on the lot, with one side resting against the said wall, and extending in front three feet beyond the plaintiffs' building

E. L. Browne and Myron Reed, for appellants.

M. H. Sessions, for respondent.

DIXON, C. J. The claim of the plaintiffs upon which this action is brought, is divided into two branches; the one, the price agreed to be paid for one-half of the party wall when used; and the other, the damage claimed by the plaintiffs for the erection of the building by Strickland beyond the line of the plaintiff's building, and up to the line of the street in front of the same.

We will consider the last branch first, namely, the claim for damage; and upon that we have but little to say. The contract was a verbal one, no writing whatever having been made or signed by the parties. The right claimed by the plaintiffs under it to control or dictate as to the use which should be made of the adjoining lot, or the manner in which the owner should build upon or occupy it, was obviously an interest in or power over land. By the statute of frauds every such interest in or power over the land of another must be granted or created by writing, subscribed by the party granting or creating the same, or it is void. R. S. ch. 106, §§ 6, 8. This contract being clearly within the statute, is therefore void, and no action can be maintained upon it in this respect. Upon this question we refer to the case of *Wolfe v. Frost*, 4 Sandf. Ch. 72, cited by counsel for the defendant; for it is seldom that an authority so exactly in point can be found. The opinion of the assistant vice-chancellor is an able one, and very satisfactorily disposes of this question.

The other branch of the plaintiff's claim, though resisted on the same ground, may not be within the statute of frauds. If the defendant had continued the owner of the lot, and had himself erected the building, and used the party wall, no reason is perceived why the plaintiffs might not have recovered the price agreed upon for building the defendant's half of it. It would then have been a contract executed on the part of the plaintiffs, and so not within the statute, and the defendant, having received the benefit of the work performed and materials furnished, would have been obliged to pay the price according to his promise. But, inasmuch as the defendant had sold and conveyed the lot before the plaintiffs built the wall, and as the plaintiffs were immediately informed of the sale and conveyance, and built the wall, knowing that the defendant had no interest in it, and would derive no benefit from it, the question arises whether they can now insist upon his paying for it. It does not appear that the defendant was guilty of any bad faith in the transactions, or that the plaintiffs had not

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ample time and opportunity to have fully protected themselves from any loss or damage in this respect, either by contracting with Strickland, the defendant's grantee, or by refusing to build one-half the wall on Strickland's lot. But since the contract was not at that time obligatory upon the defendant, the plaintiffs not then having executed it, or entered upon the work, it seems to us that the plaintiffs ought not, under the circumstances, to be permitted to avail themselves of its subsequent execution for the purpose of charging the defendant with the expense. The sale and conveyance of the land by the defendant, with notice thereof to the plaintiffs, were equivalent to a revocation, on the part of the defendant, of the contract or license to go on and build the wall which he had the right to revoke; and the building of the wall thereafter by the plaintiffs, with intent to charge the defendant with the price, seems to savor somewhat, to say the least of it, of want of due care and diligence on their part in the performance of their duty toward the defendant. We do not think, therefore, that there should be any recovery upon this branch of their claims, and are, consequently, of opinion that the judgment of the circuit court was correct, and should be affirmed.

Judgment affirmed.

 PETITION OF MCCORMICK.

(34 Wis. 492.)

Criminal law. Sentence for consecutive terms.

Where a prisoner has been convicted of several distinct offenses, the court may give judgment upon each one of them; and, in doing so, may lawfully direct that the term of imprisonment for one shall commence at the expiration of that for another, and so on until all the terms have expired.

DIXON, C. J. At the November term, 1865, of the circuit court for the county of Outagamie, the petitioner was tried and convicted upon three several indictments for larceny: the first, for stealing two oxen, the property of one Christian Juchemon; the second, two oxen, the property of one Richmond Pierson; and the third, a horse, buggy and harness, belonging to one Lot Townsend. At a subse-

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quent day in the same term, namely, on the 9th of December, 1865, three separate sentences were passed upon him by the court, the first, of imprisonment in the state prison for the period of one year, for the larceny of the oxen of Christian Juchemon; the second, of a like imprisonment for stealing the oxen of Richmond Pierson, "the said term to commence at the expiration of his imprisonment for the larceny of the two oxen, the property of Christian Juchemon;" and the third, of imprisonment in the state prison for the term of three years, for stealing the horse, buggy and harness of Lot Townsend, "said term to commence at the expiration of the term of imprisonment for the larceny of the two oxen, the property of Richmond Pierson."

The petitioner is now confined in the state prison by virtue of those sentences, and files his petition, praying that a writ of *habeas corpus* may issue, and that he may be discharged, for the reason that separate sentences, one to succeed another, each after the first, commencing at the expiration of that which precedes it, cannot be lawfully pronounced. The writ is prayed, and the discharge of the prisoner sought, upon this sole ground; the position assumed in this behalf being, as we understand it, that no sentence of imprisonment can be pronounced to commence at a future day, and, consequently, that all the sentences took effect at the same time, and ran on together, so that the petitioner's lawful term of imprisonment expired at the end of three years, that being the longest period prescribed by any one of the sentences. This being the only question presented upon the petition, we have been induced to look into the authorities with regard to it; and finding, as we do, that they are all clearly against the petitioner, we have concluded that his prayer for the writ must be denied. It has long been well settled, in cases of this kind, where the prisoner has been convicted of several distinct offenses, that the court may give judgment upon each one of them, and, in doing so, may lawfully direct that the term of imprisonment for one shall commence at the expiration of that for another, and so on, until all the terms have expired. *Rez v. Wilkes*, 4 Burrows, 2527; *Commonwealth v. Leaths*, 1 Virg. Cases, 151; *State v. Smith*, 5 Day, 175; *Russell v. Commonwealth*, 7 Serg. & Rawle, 489; *Brown v. Commonwealth*, 4 Rawle, 259; *People v. Forbes*, 22 Cal. 135.

It appearing, therefore, upon the facts set forth in the petition, that the petitioner is lawfully detained in custody and that he

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could not be discharged were the writ of *habeas corpus* to issue, it follows that the writ should be denied. *In re Gregg*, 15 Wis. 479; *In re Griner et al.*, 16 id. 423, and authorities there cited.

Writ denied.

VIVIAN, appellant, v. OTIS *et al.*

(24 Wis. 518.)

Official bond — Liability of sureties to.

Where a person holds the same office for two successive terms, the sureties on his official bond for the second term are liable only for moneys actually in his hands at the time of the execution of the bond, or received by him subsequently thereto; but they are not liable for moneys reported by him at the end of the first term, as in his hands, but which in fact he had converted to his own use.

ACTION on an official bond for an alleged default of the principal in the non-payment to his successor, the plaintiff, of certain moneys. The plaintiff received a verdict for a portion of the claim, but moved to set it aside on the ground that it was for too small an amount. That motion having been denied, and judgment entered, the plaintiff brought this appeal.

Smith & Cothren, for appellant.

Reese & Molks, for respondent.

COLE, J. The facts upon which the questions of law arise in this case are few. The defendant, *George H. Otis*, was elected to and held the office of clerk of the board of supervisors of Iowa county, for two terms. The first term commenced January, 1865, and ended January 7th, 1867; the second term commenced January 7th, 1867, and ended January 4th, 1869. This action is brought upon the official bond given by *Otis* for the second term, for an alleged default in the non-payment to his successor in office, after demand, of the sum of \$3,571.97. There was a judgment against *Otis* and the sureties of the bond, for the sum of \$1,412.

At the settlement made with the clerk by the board, at the close of his first term, January 7th, 1867, the clerk reported that there was in his hands, as redemption money, the sum of \$3,119.97. He was charged with that amount in the settlement, and gave a receipt to the board for the same.

On the trial, *Otis* was sworn as a witness on behalf of the defendants, and was allowed to testify, against the objection of the plaintiff, that when he made his settlement with the board, in January, 1867, instead of having in his hands the sum he reported and charged himself with at the time, he, in fact, had on hand only \$950 or \$960. There is no controversy but that the sum of \$3,571.97 is due the county from *Otis*, and the only question is, whether the sureties on the second bond are liable for the whole deficiency.

On the part of the county it is claimed, that, under the circumstances, the sureties on the second bond are liable for this entire amount; that as the law required the clerk to pay over to his successor in office all redemption money in his hands, and as he was his own successor, to whom he was to pay over, the sureties on the second bond became responsible for his receiving from himself the accumulated receipts of the former term, and for his having in his possession the amount by him reported as in his hands, as well as for the faithful disbursement of that amount during his second term. The court below negatived this view of the liability of the sureties upon the second bond, in effect holding, in the various instructions given the jury, that the sureties upon that bond were only responsible for the amount of defalcation occurring during the term for which they became surety; that while the settlement made by *Otis* at the end of his first term showed that he was then owing the county the sum of \$3,119.97, yet the sureties might reduce that amount by showing that *Otis* was a defaulter at that time, and had appropriated and converted a portion of that sum to his own use; and that whatever sum he had thus appropriated and converted should be subtracted from the amount for which they were sued. It appears to us that this was a correct statement of the principles of law applicable to the facts of the case. There is certainly nothing in the language of the bond which authorizes the assumption that the sureties therein undertook, not only for the future but also for the past fidelity of *Otis*, and that they would be responsible for moneys which he had appropriated during his first term. They obligate themselves that *Otis* "shall faithfully perform

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all the duties of said office, and shall pay over all moneys that may come into his hands, as such clerk, as required by law." For any moneys paid *Otis* prior to the execution of this bond, and in his hands at the commencement of the second term, the sureties therein became answerable to the county. But if he had already appropriated to his own use any of those moneys, he had been guilty of breach of duty; it was a past delinquency or default, for which they never became responsible. How does the fact that *Otis* was his own successor change the principle of law, or enlarge the liability of the sureties on the second bond? They did not undertake to make good any money which he had already misappropriated. It was only for defaults which might accrue during the second term, that they became responsible. That new sureties are not responsible for prior defalcations, unless the condition of the new obligation shall embrace them, is a principle which has frequently been decided by the courts. *Farrar & Brown v. The United States*, 5 Pet. 373; *The United States v. Boyd et al.*, 15 id. 187; *United States v. Linn et al.*, 1 Howard (U. S.), 104; *Myers v. The United States*, 1 McLean, 493; *Postmaster General v. Nowell*, Gilpin, 106; *The County of Mahaska v. Ingalls*, 16 Iowa, 81; and *Bessinger v. Dickerson*, 20 id. 261.

In this case the sureties on the second bond became liable for the faithful performance of the duties of the office by their principal for the second term, and that he would pay over all moneys remaining in his hands when the bond was executed, or which might come into his hands. So far the court below held them answerable; and a recovery has been had for a breach of that duty. If *Otis* had not the money in his hands which he reported January 7, 1867, it was because he had previously misapplied it in violation of his duty as clerk; and the question is, shall the sureties on this bond be held liable for defaults which occurred in the former term? or must the sureties in the different bonds be responsible for the misconduct and defalcation of each period for which they obligated themselves? It is a familiar principle that "the obligation of a surety is a matter of strict law, and can never arise by implication. The bond must speak for itself, and its language can never be extended or altered to the injury of the surety." *Myers v. The United States*, *supra*. It would be a violation of this elementary principle to hold the sureties on the last bond liable for the defaults of the first as well as the second term.

Goodnough v. The City of Oshkosh.

This is the important question in the case, and is decisive of all other points discussed by counsel. On the whole case, we think, the judgment clearly right, and that it must be affirmed.

Judgment affirmed.

GOODNOUGH, appellant, v. THE CITY OF OSHKOSH.

(24 Wis. 542.)

Liability of city for defect in highway — notice of defect.

In an action against a city to recover damages for an injury sustained from a defect in the highway, it must be shown that the public authorities had notice of the defect, or that it was of such a nature, and had existed for such a length of time, that knowledge on their part must be presumed.

APPEAL from an order setting aside a verdict for the plaintiff and ordering a new trial. The action was to recover damages for injuries sustained by the plaintiff from a defect in defendants sidewalk.

Jackson & Halsey, for appellant.

James Freeman, for respondent.

DIXON, C. J. The counsel for the plaintiff having been absent from the court below when the motion for a new trial was granted, and not being informed upon what particular point of law or fact the verdict was set aside, have very fully and successfully answered many points which they supposed might be urged in support of the order. But they have, as we think, failed to discover and discuss what must have been the real point of objection in the mind of the court below. The injury sustained by the plaintiff was caused by a defect in a sidewalk which had once been properly built. It was a defect of a kind not easily to be seen or discovered. A plank had become loosened from the stringers, and when the plaintiff stepped upon it it tipped up, and she fell, dislocating her ankle and fracturing the largest bone of her leg below the knee. On examining the testimony, which is reported in full in the bill of exceptions, we find no sufficient evidence that the city authorities had notice of

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the defective condition of the sidewalk so as to charge the city with liability for the injury. The alderman and street commissioner for the ward in which the sidewalk was, testified that he frequently traveled over the sidewalk in question, and that he had not any notice of its being out of repair. The plaintiff received her injury on the 7th day of May. The street superintendent testified that he examined the sidewalk at the place of injury about the first of the same month, and it was not out of repair. This is all the testimony with regard to the knowledge of the city officers. In cases like this, where the defect in the highway is of recent occurrence, it is necessary, not only to show that the injury was caused by reason of such defect, but also that the public authorities had notice of it, or that it was of such a nature and had existed for such a length of time, that knowledge on their part must be presumed. See *Ward v. The Town of Jefferson*, 24 Wis. 342, and cases cited; *Cook v. Milwaukee*, ante, 183.

This, we believe, must have been the point on which the court below granted the motion, and the testimony in support of the verdict was in this respect so very slight and unsatisfactory that we think the verdict was properly set aside.

Order affirmed.

PIERCE V. THE MILWAUKEE AND ST. PAUL RAILROAD COMPANY
et al., appellants.

(24 Wis. 551.)

Mortgage of subsequently acquired property — when will cut off vendor's lien.

Where a railroad company, in pursuance of a power in its charter to borrow money and to execute the required securities therefor, executed a mortgage on its road, etc., and on "all future right thereto and interest therein to be acquired," *held*, that such mortgage was a valid lien on all lands over which the road was at the time located, though the title thereto or right of way was not acquired until subsequently; and that it was prior to the lien of the vendor of such right of way for the purchase-money.

APPEAL from a judgment in favor of the plaintiff.

The following are the facts: In April, 1856, the Milwaukee and Horicon Railroad Company in pursuance of a power contained in

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its charter, executed a mortgage on a portion of its road, etc., to one Lowry. The road was at that time constructed across the lands of the plaintiff, but the company had not acquired the right of way. In June following the plaintiff conveyed the right of way to the company, but was not paid the purchase price. In 1863 the Lowry mortgage was foreclosed, and the purchasers at the sale afterward conveyed the road to the Milwaukee and St. Paul Railroad Company. This action was brought against the latter company and the Milwaukee and Horicon Railroad Company, to recover the purchase price of the right of way theretofore, conveyed through plaintiff's land. The terms of the Lowry mortgage and the other facts are set forth in the opinion.

John W. Cary, for appellants.

Gillett & Pier, for respondent, to the point that the mortgage would cover only subsequently acquired personalty, and that the railroad company had not power to mortgage subsequently acquired property, cited *State v. Mexican Gulf Railway Company*, 3 Rob. (La.) 513; 10 Ohio St. 525; 47 Penn. St. 255; 2 Redfield on Railways (3d ed.) 507.

COLE, J. By its charter, the Milwaukee and Horicon Railroad Company was expressly authorized to borrow money, and to make and execute, in its corporate name, all necessary writings, notes, bonds and other papers, and also to execute and deliver "such securities, in amount and kind," as might be deemed expedient to secure such loans. Section 21, chap. 450, Laws of 1852. It therefore had full power to make and deliver the mortgage to Lowry, bearing date April 1, 1856. By that instrument the company mortgaged all its road, from the junction thereof, with the La Crosse road, in or near the village of Horicon, to a point in or near the village of Berlin, being about forty-two miles of road, "including the right of way and land occupied by said road, together with the superstructure and tracks thereon, and all rails and other materials used thereon, bridges, viaducts, culverts, fences, equipments, necessary depot grounds and buildings thereon," belonging to the mortgagor, with the rolling stock and personal property appertaining to that line of road, then belonging to the company or thereafter to be acquired, "and all future right thereto and interest therein to be

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acquired by the " corporation, together with the name and functions appertaining to the road, with its corporate rights and franchises. The mortgage then, in express terms, covered the franchises and property, real and personal, belonging to the company, April 1, 1856, and also all future acquired real and personal property for that portion of its road, and this mortgage was executed by direct legislative authority conferred upon the corporation in its charter. In the mortgage, the company, among other things, covenanted "to execute and deliver any further reasonable and necessary conveyance or conveyances, of the premises, or any part thereof, to the said party of the second part," "for more fully carrying into effect" the trusts created, "particularly for the conveyance of any rights, interest or property subsequently to the date hereof, acquired by said parties of the first part, and comprehended, or intended so to be, in the description and terms of this instrument."

Now, it appears that the plaintiff and wife, in June, 1856, sold and conveyed to the Milwaukee and Horicon Railroad Company the premises mentioned in the pleadings, and upon which a vendor's lien for the purchase-money is now sought to be enforced. It is difficult to see upon what principle the action can be maintained.

It is apparent that the Lowry mortgage purported to include the right of way across the plaintiff's land, which was the subject-matter of the conveyance from him to the company. It is true, the title to those premises was not in the company when the mortgage was executed; but it is perfectly clear that it was the intention of the parties that the mortgage should become a lien upon any right or interest in real estate subsequently acquired for right of way, or necessary for the use of the road. It is insisted in the brief of the counsel for the plaintiff, that the instrument did not purport to mortgage future-acquired realty; but a bare reference to the clauses which have been cited will show that this view is inadmissible. It obviously purports to convey as well the real and personal property belonging to the company at the time of the execution of the mortgage, and therein described, as all real and personal property subsequently acquired for the use of the road. The language employed is not fairly susceptible of any other construction; and, this being so, it is very manifest that, when the company subsequently acquired an interest in these premises, from that moment the mortgage became a lien and charge upon them. *Farmers' Loan and Trust Company v. Fisher et al.*, 17 Wis. 114, and cases cited in the opin

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ion; also see *Miller v. R. & W. R. R. Co.*, 36 Vt. 452. And there is a still stronger reason for holding in this case that any after-acquired interest in real estate for the use of the track would inure to the benefit of the mortgagee, and become vested in him, in view of the fact that the mortgage contains the covenant for further assurance above quoted. Could it, with any justice, be claimed that the Milwaukee and Horicon Railroad Company, after executing the mortgage with this covenant, might assert its title to the premises in question? It seems to us not, but that the company would be clearly estopped from saying that the mortgage did not become a lien upon them. But this is not the only difficulty in the way of the plaintiff in enforcing a vendor's lien upon the premises. The Lowry mortgage has been foreclosed in an action to which the Milwaukee and Horicon Railroad Company was made a party defendant. A foreclosure sale was had of all the property, corporate rights and franchises embraced in the mortgage. It appears that Hunt and Sage purchased the property at the foreclosure sale, and have conveyed it, without notice of any equities of the plaintiff in the premises, to the defendant company. Now, we suppose the purchaser at the foreclosure sale obtained whatever interest the Milwaukee and Horicon Railroad Company had in the premises, as well as the rights and interest of the mortgagee under the mortgage, whatever they were. Such was the necessary effect of the foreclosure, and that it would be a violation of all principle to permit the plaintiff, after the foreclosure sale, and at this late day, to enforce a vendor's lien for the consideration named in the deed given in June, 1856, really seems to us too plain for argument.

We think the judgment of the circuit court must be reversed, and the cause remanded, with directions to dismiss the complaint.

So ordered.

Meyer v. The Chicago and Northwestern Railway Co.

**MEYER v. THE CHICAGO AND NORTHWESTERN RAILWAY
COMPANY, appellant.**

(24 Wis. 506.)

Common carriers—liable for mistakes of agents.

Where, through the negligence of the servants of common carriers, goods shipped over their line are not delivered to the consignee when called for by him, and they are afterward destroyed while in the freight department of the carriers, the latter are liable for the loss

APPEAL from a judgment for the plaintiff.

The plaintiff, shipped at Jefferson, goods over the defendant's road, consigned to J. Weil & Brother, Chicago. By a mistake of the station agent at Jefferson, the goods were entered on the way-bill as consigned to another firm, in consequence of which they were not delivered to the consignee at Chicago when called for. The goods were afterward burned in defendant's freight-house, and this action was brought to recover their value.

Enos & Hall, for appellant.

Weymouth & Porter, for respondent.

COLB, J. It is perfectly certain that the goods were lost in consequence of the mistake of the agent at Jefferson station, who entered them on the way-bill sent to Chicago as consigned to "T. Weil & Company," instead of "J. Weil & Brothers," as they were marked. The goods were plainly and legibly marked, so that there could be no mistake about the consignees; and it was the obvious duty of the agent to see that they were properly entered on the way-bill. This he did not do, but, through carelessness, he entered the goods as though consigned to "T. Weil & Company." Consequently, when the employees of "J. Weil & Brothers" called for the goods at the freight depot at Chicago, they were told that there were no such goods there for them. And the mistake was not discovered until the goods were burned, with the freight depot.

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shortly after. Now, the question is, should not the company be held responsible for the mistake of its station agent at Jefferson, in thus entering the goods on the way-bill sent to Chicago, so that it failed to point out the true consignees?

It seems to us a very plain ground of liability, to hold the company responsible for the negligence and mistake of the agent in failing to enter upon the way-bill the names of the proper consignees. The owner was not at fault, for he had delivered the goods to the station agent at Jefferson, marked in a plain and intelligible manner. And the employees of the consignees called for them at the proper freight depot at Chicago, and were told by the freight agent that they were not there. The goods were entered on the way-bill as consigned to other parties, and, as a consequence, they were not removed, but were destroyed by fire, with the depot in which they were, when called for by the consignees. If the freight agent at Chicago had examined the marks upon the goods, or if the station agent at Jefferson had not been guilty of great negligence in entering them upon the way-bill, the loss would not have happened; and it seems to us a very plain proposition, that the company is responsible for these mistakes of its agents. *The Jeffersonville R. R. Co. v. Cotton*, 29 Ind. 498.

It is said by the counsel for the carrier, that the evidence clearly shows that the goods were safely transported to Chicago, the place of consignment, and placed in the depot of the company, and then its responsibility terminated, before any loss or damage occurred. The court below, however, instructed the jury that the liability of the carrier continued until it had given the consignee notice of the arrival of the goods. But whether this was a correct view of the law or not we do not deem it material to inquire, since the evidence clearly shows that the loss occurred in consequence of the mistake of the Jefferson station agent in entering the names of the consignees upon the way-bill. Had it not been for this gross blunder and mistake, the employees of J. Weil & Brothers would have obtained the goods when they called for them, before the fire occurred. It was, then, in consequence of the negligent acts of the agents of the company, whose duty it was to enter the goods properly in the way-bill, that they were destroyed; and the company, upon every principle, ought to make good the loss. This being so, the instructions of the court become immaterial.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
IOWA.

BURNHEIMER BROS., appellant, v. HART.

(27 Iowa, 12.)

Promissory notes — collateral security.

A judgment against an indorser upon a note held as collateral security for such indorser's individual note, and settlement of claim against indorser upon such judgment, the judgment being thereupon assigned to the indorser, will not bar a recovery against him upon the individual note.

APPEAL from Davis district court.

This action was upon two individual notes made by defendant. The plaintiffs held, as collateral security to these notes, a note against other parties, which was indorsed by defendant. They had, previous to the trial of this action, obtained judgment against the makers of the collateral note, and against the defendant as indorser, and had made a settlement with defendant upon that judgment, whereir defendant paid the plaintiffs twenty-five per cent thereof, and took an assignment of the judgment to himself. The verdict in the court below was in favor of the defendant, and plaintiffs appealed.

D. P. Palmer and Amos Stoeckel, for appellants.

M. H. Jones and H. H. Trimble, for appellee.

WRIGHT, J. The court instructed the jury that the judgment against the defendant, as indorser of the collateral note, was a bar to a suit on the notes thus secured, to the extent of such collateral,

and that if, therefore, the judgment on such collateral was equal to or exceeded the amount of the notes now in suit, such collateral judgment would be a complete bar to the action.

This could hardly be the law under any state of facts, and is certainly not, under the circumstances disclosed in this record. It in effect makes the collateral contract (or the agreement under which the collateral security was taken) supersede the original or principal one. It gives it a dignity and magnitude never contemplated by the parties, and certainly not by the law. It is, hence, bottomed upon a false assumption. A recovery upon a note may bar a recovery for that which formed the consideration for the note. But that would not be this case. The liability of defendant upon the original note, is quite distinct from that upon his indorsement of the instrument which was given in pledge or security for the antecedent or original debt. The contracts are quite distinct. If this is not so, then a failure by plaintiffs to make proper demand and give due notice would not only release the indorser upon that which is a mere incident, but also upon the original or principal undertaking, and certainly this would not be claimed.

In this case, however, we need not go thus far, for *defendant himself* settled the judgment upon the collateral note, and took an assignment of it. And hence it seems to us, that the true inquiry is, whether this settlement had the effect of paying or extinguishing the original note or indebtedness. It certainly would not, unless it was so agreed or understood. Defendant was the sole debtor as to the notes now in suit. As to them there is no surety. He was the *surety* as to the note transferred. By agreement, the surety in the one case, and the principal in the other, pays so much of the collateral debt, takes an assignment of it, or the judgment rendered thereon, and at once claims that the original debt is extinguished, or, at least, all right of action thereon is barred. If so, then it would be equally true if plaintiff had surrendered or assigned the collateral judgment, without receiving any part of the same, and it would hence occur that, though the real and original debtor paid no part of his debt, and though he collected by the consent of his creditor the whole of the collateral judgment, such creditor could not sue him upon the original indebtedness, whatever his other securities, and however important in view of "homestead" or other rights, that his contract should date anterior to the time of the indorsement of the collaterals. It certainly requires no

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argument to show the fallacy and injustice of such a position. The *satisfaction* of the collateral debt, to the extent of that which it was given to secure, might bar a recovery upon the original. But not a *judgment*, merely, against the collateral debtor, though the original debtor by reason of his contract of indorsement, should be joined therein. These views substantially dispose of the case. And yet, turning to what is suggested in argument rather than the record, a single other word seems necessary. What effect a settlement by plaintiff with the makers of the note, which he held as collateral, without defendant's consent, might have upon defendant's rights, we need not inquire, as from the whole record it is indisputable that he (defendant) settled with plaintiff, and he cannot, therefore, complain that he was prejudiced thereby. Whether this settlement included the notes now in suit, was a question of fact fairly submitted to the jury, under apparently correct instructions, and yet we cannot say that the jury may have found for defendant upon this issue, and that therefore the error in the instructions first noticed contained no prejudice. The doctrine to which counsel refer, to wit, that if a judgment is right upon the face of the whole record, this court will not reverse for an abstract cause, has no application; for the testimony not all being here, we cannot say that the judgment is right. We do not need to indulge in presumptions to find error. The instruction as to the effect of the prior judgment concluded the whole case. It was plain, clear, unambiguous. Under the facts which the testimony tended to establish, the jury had no alternative.

To have found otherwise would have been most manifestly erroneous. The instruction was necessarily calculated to lead to a wrong result, did, it is fairly apparent, so lead, and the judgment must therefore be

Reversed.

MOTE V. CHICAGO AND NORTHWESTERN RAILROAD CO., appellant.

(27 Iowa, 22.)

Carriers of passengers—Their liability for loss of baggage—Interest when recoverable.

The liability of a railroad company as a carrier for the baggage of a passenger terminates upon the expiration of such reasonable time, after arriving at the place of destination, as will enable the passenger to receive and take charge of his baggage.

When the baggage is unclaimed within the proper time, it is the duty of the carrier to store it in a proper and secure place until called for, and when so stored the carrier becomes liable therefor as a warehouseman, and his liability as carrier ceases.

In case of loss for which the carrier is found to be liable, interest is recoverable upon the value of the property from the day of its loss.

APPEAL from Marshall district court.

This action was to recover for loss of baggage. The facts appear in the opinion. Verdict and judgment below in favor of plaintiff, from which defendant appeals.

Henderson & Binford, for appellant.

Boardman & Brown, for appellee.

BECK, J. The plaintiff was a passenger upon the train of defendant, going from Marshall to Le Grand, a small village and unimportant station upon defendant's railway. He had with him a trunk containing wearing apparel, which was "checked," as was the custom upon the railway, to be delivered at Le Grand, the place of his destination. Before the train reached the station-house at Le Grand, plaintiff left the car, being enabled so to do on account of the slow rate at which the train was running, and his trunk was taken to the station-house and left by the baggage-master of the train upon the platform, where it remained several hours; not being called for, it was removed by the agent of defendant, in charge of the station-house, into a room, the only place for storing such baggage, connected with the station.

It appears that this building was temporary in its construction, and was not, in fact, a secure place for keeping such property. The

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door was left unlocked, or was secured in such a manner that it was no hinderance to any one wishing to enter the building. It could be readily opened by any one. At night the building was left without a guard or watch, and no one occupied it. During the night-time the trunk of the plaintiff was broken open, and wearing apparel to the value of \$71.15 was stolen therefrom. The plaintiff did not call for his trunk until the second morning after it had been left at the station.

II. The question here presented is, as to the nature and extent of the liability of railway corporations for the baggage of a traveler, at and after the completion of the journey upon which it contracts to transport him. The liability of such a carrier terminates, as such, upon the expiration of such reasonable time after arriving at the place of destination as will enable the traveler to receive and take charge of his baggage.

In determining what will be reasonable time, the customs of the railway and of the station, the manner of transporting baggage therefrom, in short, the peculiar circumstances surrounding each case, must be considered, and the jury were so instructed in a separate instruction.

III. But care and liability of the company did not terminate upon arrival at the place of destination and holding there, for reasonable time, the baggage of the traveler for delivery. If the baggage is not called for, the carrier cannot abandon it. It must be stored and kept with proper care until claimed. This rule is not only the result of sound reason, but required by the customs and habits of public carriers and of travelers who are transported by them. It is not always practicable or convenient for the traveler to call within the required time for his baggage, and, frequently, he may, for convenience, permit his baggage to be carried in advance to the place of destination. This may result from his stopping over on the way, a practice that is permitted by the customs of railways. The system of "checking" baggage, by which it is taken from under the personal control and oversight of the traveler, and held until the return of the "check," secures the carrier from loss, by delivering it to an improper person, and renders its identification certain. This system renders the transfer of baggage from one carrier to another obligatory, and makes necessary proper and secure places for storing and keeping it until transferred. Such places for storage the law requires these carriers to provide.

When baggage is unclaimed within the proper time, it is the duty of the carrier to store it in such proper and secure place, until called for or otherwise disposed of, as required by law. *Roth v. B. & S. L. R. R. Co.* 34 N. Y. 348; *Powell v. Meyers*, 26 Wend. 591; *Oumit v. Henshaw*, 35 Vt. 605; Angell on Carriers, §§ 114, 320. When the baggage is thus stored, the carrier becomes liable therefor as a warehouseman, mere bailee in deposit, and his liability as a carrier ceases. See authorities above cited, also *Frances v. Dubuque and Pacific Railroad Company*.

The obligation of a warehouseman is to take common and reasonable care of the property intrusted to his charge, and exercise toward it such diligence as men usually exert in respect to their own concerns. Story on Bailments, §§ 444, 11. He is not liable for theft; unless it is the result of want of proper care.

IV. The act of plaintiff, in permitting his trunk to remain in charge of defendant's agent so long without calling for it, was not such negligence on his part as will relieve defendant of responsibility for its loss. He did properly rely upon the obligation of defendant to take ordinary care of it until called for, and if the care and diligence required by law was not extended toward it, defendant is liable therefor. In the light of these doctrines, the jury were correctly instructed, and the court properly refused the instructions asked by defendant.

V. The court directed the jury that, in case they found for plaintiff, he was entitled to recover the value of the property, and interest thereon from the day of loss, at the rate of six per centum per annum. There was no dispute nor conflict of evidence as to the value of the property, which was \$71.15. The verdict is for \$84.12. The jury, therefore, in obedience to the instructions, allowed interest upon the same, which was found to be the true value of the property.

It was formerly a general rule, that interest could not be recovered on unliquidated damages. But this rule has been much modified by modern decisions. See Sedgwick on the Measure of Damages, 377 *et seq.*, and authorities cited; 3 Parsons on Contracts, 105 *et seq.* And it appears to us that, under the rule as now understood, and the provisions of the statute (Revision, section 1787), interest is recoverable in this case at the rate fixed by the instructions. The amount of the value of the property lost by plaintiff became due from defendant upon the day of the loss, and was from that

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moment an indebtedness. It was an indebtedness, too, originating upon a contract, the contract between the bailor and bailee, and the action was brought thereon. We are of the opinion, therefore, that interest is recoverable thereon, and that the instruction upon that subject is correct.

Affirmed.

HANSON *et al.* v. VERNON *et al.*

(27 Iowa, 25.)

Constitutional law. Limits of legislative power to impose taxes. Taxation in aid of railroads.

Under the constitution there is no legislative power to endow public or municipal corporations with the faculty of subscribing to the stock of a railroad company, and to levy a tax on the inhabitants, to pay therefor.

The main ground of objection to acts authorizing such subscriptions is, that the debts thereby created will necessitate an additional tax upon the inhabitants and property owners within such corporation.

The legislature may lawfully interfere with private property only in the following ways:

1. It may authorize it to be forfeited for crime, or sold for its owner's debts, judicially established.
2. Take it for *public* use under power of eminent domain, but then only on condition of making just compensation in *money*; but not for *private* use, even if it does make compensation.
3. Condemn it under the *police* power when it endangers public health, welfare or safety.
4. Take it by virtue of the taxing power.

Taxation is a legislative power, and taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes, or to accomplish some governmental end. They cannot be imposed for a private purpose.

The foundation of the taxing power is political necessity. The circumstance that taxes are contributions demanded for the use of the government, and not for private uses; confers upon the power to tax its peculiar character.

Legitimate taxation is without limit, and unless there is some limit fixed by the constitution, the state may tax property to its full value.

An act of the legislature may be unconstitutional in two ways; first, because it assumes or seeks to confer power not legislative in its nature; second, because it violates some specific provision of the national or state constitution.

An act imposing taxes to aid in the construction of a railroad, owned and controlled by private corporations, is unconstitutional in both these ways.

The power of taxation and of eminent domain are, in some respects, essentially different, and it does not follow that a tax can be levied for the benefit of a private corporation, though the enterprise be one that would justify the exercise of the right of eminent domain.

APPEAL from Henry district court.

By an act of the legislature of Iowa, passed March 22, 1868 (Laws of 1868, ch. 48), townships, incorporated towns and cities were authorized to aid in the construction of railroads, and to levy taxes therefor. The act is as follows:

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That it shall be lawful for any township, incorporated city or town in this state, through which any railway has been, or hereafter may be, located, or to which it may be contiguous, to aid in the construction thereof, as hereinafter provided.

SEC. 2. Whenever a petition shall be presented to the council or trustees of any incorporated city or town, or any township, signed by one-third of the resident tax payers of such township, city or town, asking the question of aiding in the construction of any railway, to be submitted to the voters thereof, it shall be the duty of the trustees, or council, or boards of trustees, to immediately give notice of a special election, such notice to be given in the manner of notices of general elections, which notices shall specify the rate of tax to be raised, at which election the question of "taxation," or "no taxation," shall be submitted; and if a majority of the votes polled be "for taxation," then, in that case, the township trustees and councils, or trustees of cities and towns, shall at once determine the *per centum* of the same, and cause their respective clerks or recorders to prepare and certify to the clerk of the board of supervisors, as soon as practicable, lists of the same, which shall be an equal percentage on the taxable property in such township, city or town; but said rate shall not exceed five per cent upon the assessed value of the property therein.

SEC. 3. That so soon as such tax-lists are prepared, the tax herein provided for shall be due and collectible in the same manner as the county tax is collected; and it shall be the duty of the treasurer of the county to proceed by himself or deputy to collect the same, and to pay it into the treasury of such county; and the same shall be paid out by such treasurer upon the order of the president or managing director of the railroad company, whose road such tax is

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voted to aid; which order shall be accompanied by estimates of the engineer in charge of the work on such road, showing that an equal amount has been expended for the construction of such work within such county; and it is hereby provided that the tax so raised by any township, city or town, shall be only expended to aid in the construction of such road within such township, or the one contiguous thereto, as near as practicable; *provided*, that any tax payer producing to the county treasurer, prior to the collection of the tax, a voucher of the proper officer of the railroad company, showing that his tax has been paid to the satisfaction of the company, shall, on filing the same with the county treasurer, be discharged from the tax.

SEC. 4. All acts or parts of acts conflicting with the provisions of this act are hereby repealed.

This action was brought in equity by resident proprietors, owners and tax payers, to enjoin township trustees and clerk from proceeding under the act. An *ex parte* injunction was granted below, and afterward dissolved, whereupon plaintiffs appealed

Theron W. Woolson, Withrow & Wright, F. Semple and Leroy G. Palmer, for plaintiffs.

R. P. Lowe, G. B. Corkhill, H. R. Ambler, John Porter, E. W. Eastman and Henry Strong, for defendants.

DILLON, C. J. The only question presented by the record necessary to be decided is, whether the statute of March 22, 1868 (Laws of 1868, ch. 48, p. 54), authorizing local aid to railroads, is a constitutional enactment.

With possibly one exception, no question in the judicial history of the state has arisen which rivals the present in importance, whether it be considered with reference to the grave principles of constitutional law it involves, or the vast material interests, present and future, which it affects. It has been argued on either side with consummate ability. The learned counsel engaged in the cause have, it is believed, omitted no consideration essential to an understanding of the question in all its manifold relations.

It has been argued in the light of principle, and as a question resting on authority.

The adjudged cases bearing upon both sides of it have been

examined with that boldness and keen and searching ability to which they are ever subjected when they block up the pathway of able counsel.

If the conclusion arrived at is erroneous, the fault, let it be confessed, is wholly ours. If any previous question in this court has approached the present in importance, it was the one concerning the validity of county and city subscription to the stock of railway companies, when it was first presented to our predecessors, in 1853, in the case of *Dubuque County v. The Dubuque and Pacific Railroad Company*, 4 G. Greene, 1.

That the majority of the court there reached a wrong result remains no longer a matter of doubt. Subsequent decisions have so declared, and these decisions have the approval of the professional mind of the state. A most unfortunate mistake it was; counties and cities throughout the state, acting under the sanction of that decision, incurred debts amounting to several millions of dollars, and, in many cases, exceeding their ability to pay. Disaster the child of extravagance and debt, and dishonor, the unbidden companion of bankruptcy, are the bitter but legitimate consequences of that decision, "and the end is not yet." In every other state in which a similar decision was made, similar consequences have ensued. In *Sharpless' Case*, hereafter to be referred to, the supreme court of Pennsylvania affirmed the validity of such subscription, and the practical commentary upon it may be found in the history of the Alleghany county and Pittsburg cases (*Commonwealth v. Alleghany County*, 32 Penn. St. 218, 1858; *Commonwealth v. Pittsburg*, 34 id. 496), and in the fact, that by an amendment of the constitution, made in 1857, such legislation is expressly prohibited.

We are now, with respect to this question, where, in 1853, our predecessors were with respect to that—at its threshold,—called upon to decide it before rights have grown up under the sanction of any previous decision.

This subject is alluded to, not only because it exhibits the pernicious fruits which an unsound principle of law will ever bear, but because, as will hereafter be shown, the same unsound principle underlies the statute now under consideration. The thought cannot be repressed, how different would be the situation of our state to-day had the decision in the *Dubuque* case been the other way. We should have been free of the heavy bur-

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ous of debt which that decision bequeathed us, and in all probability had every railroad we now have.

We have allowed our experience, however, no further sway than to lead us to examine the principles involved in the act of 1868 with unusual care. It is quite manifest from the legislative history of the measure, and from circumstances disclosed in the argument, that a decision in favor of the law would be highly satisfactory to many portions of the state. Our decision, although intelligent, disinterested professional men must have anticipated the result, will no doubt disappoint many persons. I could have wished it otherwise; and I certainly approached the consideration of the question (as doubtless did every member of the court) with a disposition, as was my duty, to sustain the act (as gladly I would, notwithstanding my decided convictions of the general impolicy of such legislation) if it could be done without making a dangerous breach in those barriers which the constitution has erected to protect private property from legislative invasion. Again, the question respecting the validity of the act of 1868 was felt to be complicated with the one concerning the constitutional power of the legislature to authorize public corporations to subscribe for the stock of railway companies, and levy a tax to pay the debt thereby incurred. As before stated, our predecessors, in 1853, by a divided court, held that the legislature had the constitutional power to authorize municipal and public corporations to make such subscriptions.

Subsequently, in 1862, the prior holding was overruled, and the court, without division, held that the legislature could, under the constitution, confer no such power. *The State, etc., v. Wapello Co.*, 13 Iowa, 388.

This view, in all the subsequent changes of judges, has, without dissent, been adhered to; and was re-affirmed in the most solemn manner by the whole court, as recently as the last term, in the case of *McClure v. Open*, 26 id. 243.

If any thing can be said to be settled in this state, it is, that, under the constitution, there is no legislative power to endow public or municipal corporations with the faculty of subscribing to the stock of a railroad company, and to levy a tax on the inhabitants to pay therefor. Everybody so understands it. I have so understood it ever since I have been upon the bench, and have never felt myself at liberty to regard it as an open question. Not one of the

counsel concerned in this cause has asked the court to overturn its decisions, and to hold such subscription and tax to be constitutional.

It being settled, then, that they are unconstitutional, it would justly disgrace this tribunal and the state, if we should hold the present act to be valid, unless it is *in fact* different from the other question, and unless this asserted difference can be sustained and vindicated by reasons which can endure the keen scrutiny to which they would inevitably be subjected, and which would strike and satisfy the common sense of intelligent men as resting on a solid foundation.

The great effort of counsel, who have argued for the validity of the act of 1868, has been to show that a distinction in its favor did exist. In my opinion this effort has not been successful, and, if any distinction can be drawn, it is one unfavorable to the act under consideration. For it might, perhaps, be admitted that, in view of the absolute power of the legislature over public corporations, it might enlarge their powers and capacities, although this might consequentially affect the citizen by increasing his taxes, when it would not be true, and could not be admitted, that the legislature could act immediately and directly on the property owner, and compel him, without compensation, to part with his property by way of a forced gratuity to a private corporation.

The main ground of objection to acts authorizing or recognizing subscriptions by public corporations to the stock of railroad companies is, the fact that the debts thereby created will necessitate an additional tax upon the inhabitants and property owners within the limits of such corporations. This will be apparent from an examination of the ablest judgment ever rendered in support of the constitutionality of such subscriptions. I refer to the opinions of the judges of the supreme court of Pennsylvania in the *Sharpless Case*. As the point is important, I verify my statement respecting it by quotations from these opinions. Thus BLACK, Ch. J., who delivered the leading opinion, referring to this subject, says: "The only substantial wrong complained of in the bill is, that a public debt is about to be created for a purpose which the plaintiffs are unwilling to join in promoting; and that the debt may, and most probably will, involve the necessity of a tax, of which they must pay their share. Except for their liability to this tax, they would have no standing in court. This (the liability to be taxed) is the head and front of the offending against them. But if it be imposed

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in pursuance of a law passed by the supreme legislative authority of the State, and not in conflict with the constitution, it must be borne. This brings us to inquire, *what is the extent of the right to levy taxes?*"

(Per BLACK, Ch. J., in *Sharpless v. Mayor of Philadelphia*, 21 Penn. St. 147, 167.)

He then proceeds to show that the legislation in question, viz., the statute authorizing a subscription by a city to the stock of a railroad corporation, did not, in his opinion, contravene any provision of the state constitution of Pennsylvania.

In the same case, WOODWARD, J., after stating the question involved to be this: "Had the legislature constitutional power to authorize the city of Philadelphia to subscribe for stock in these railroad companies; to borrow money to pay the subscription, and to levy taxes to pay the loans?" says: "What we have to deal with here, then, is the *constitutionality of laws for taxation*." Id. 177, 178.

The only other opinion in the case was a brief one by KNOX, J., and the only question he discusses is that of taxation, and he arrives at the conclusion that "There is in the bill of rights no limitation upon the right of taxation," and hence the act is valid.

LEWIS and LOWRIE, JJ., dissented *in toto*.

I have made these quotations and references, to show that the main ground upon which the constitutionality of the law was assailed was in respect to *the tax it authorized*. That court held the law to be valid. This court has held just such a law to be invalid.

It is absolutely impossible, as I think, to hold the act of 1868 to be valid, and yet stand by the decision in the *Wapello County Case*, 13 Iowa, 388, which was, that the legislature "could not, under any circumstances, pass an act which will make it lawful for a county or city, in its corporate capacity, to subscribe stock in a railroad company. Id. 399, 400.

That, in the *Wapello County Case*, the *tax* was a leading objection to such laws, see particularly those portions of the opinion on pages 404-406. I will not consume time by quoting from it, as it may easily be referred to. It is true that other objections to such laws were stated and urged, such as that these public corporations were thereby made shareholders in the hazardous business of railway carriers. But, after all, it is the *tax* which these laws authorize, or necessitate, which constitutes the main objection to them. I suppose it is perfectly competent for a public or municipal corpora-

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tion to accept a bequest or donation of stock in a private corporation, and the mere fact that the corporation issuing the stock is engaged in a perilous business, does not disable a city or county from becoming a stockholder therein by will or gift, or in any legitimate manner. It seems to me scarcely necessary to spend more time in showing that it is mainly the tax features in these laws that make them objectionable.

I repeat that I see no way to stand by the prior decisions of this court, and yet uphold the act of March, 1868.

This branch of the case is so fully and satisfactorily discussed by my brother WRIGHT in his opinion, that I forbear any further remark upon it, and proceed to a discussion of the constitutionality of the act of 1868—set out in full in the statement—upon the merits of the question, and without reference to the decisions of this court respecting subscriptions to the stock of railway companies.

It lies at the foundation of this question to ascertain what the act of 1868,—which, I may remark in passing, became a law without the express approval of the able and distinguished gentleman who occupies the executive chair of the state,—authorizes to be done. This accomplished, we are then prepared to bring its provisions to the test of the constitution. The substance of the act of 1868 is, that, if a majority of the voters of any township, city or town, shall, at any special election, vote in favor of aiding in the construction of any railroad located as therein specified, a tax shall be levied, collectible in the same manner as county taxes, not to exceed five per cent upon the assessed value of the property in the township, city or town. This tax, when collected, forms no part of the public revenue, but it is to be paid over to the proper railroad company as provided in the act. That the tax belongs wholly to the railroad company is obvious from the provision in the act which allows the tax payer to pay the amount directly to the railroad company, whose receipt will discharge him from the tax.

In passing, I point out, but do not dwell upon, the fact that *any railroad*, without being required to furnish any guarantees of its ability to perform its undertaking, may be thus aided; that the non-tax payer as well as the tax payer may vote; that the elections are to be *special*, which experience shows are usually not fully attended; that there is no limit in the terms of the act respecting the number of railway companies which any one township, city or town may successively aid, to the extent in favor of each of one-twentieth of

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all the property therein—these are matters showing, indeed, how loosely the act is framed, and how much it could be abused, but do not, perhaps, very closely touch the question of legislative power to pass it.

The essential element is, that it is *a tax* which is authorized, and that the proceeds of this tax belong to *the railroad company as its own*, without making any direct return therefor to the tax payer. So that the question is, has the legislature the constitutional power to tax, or authorize to be taxed, the people or property of a township, city or town, and *give* the amount thus raised to any railway company, and to every railroad company which will expend it in the district in which it was laid, or in a contiguous district, in the construction of a railroad. I say *give* the money to the railroad company, for it belongs to it, and neither the tax payer, nor the township (which is in fact not an incorporated body), town or city, gets any compensation therefor, and has no interest in the road or its stock by reason of such payment.

So that, I repeat, the question is, has the legislature the constitutional right, by virtue of the taxing power, to raise money from the citizen in this manner, and hand the money, thus raised, over as a *gratuity, or bounty, or gift*, to a private corporation organized for pecuniary profit, the tax payer having no interest in the corporation or its stock by reason of such payment?

Is the power of the legislature so transcendent, and is its arm so strong, that it may put it forth and grasp every man's property, and declare that it will sequester five per cent thereof, or one hundred per cent thereof, and donate it to any railway corporation that will locate its road in the district in which the property is situate?

This is the momentous question with which we have to deal, involving no less than the tenure by which every man holds his property.

While it is understood that there is a similar statute in some of the other states, no decision of the question in the form here presented, has been called to our attention.

Intelligently to answer this question, it is necessary to see with what guarantees the constitution has invested private property—to ascertain the limitations upon the authority of the legislature in this respect—and to consider the nature and extent of the taxing power, since it is under this power that this extraordinary legislation is sought to be upheld.

As a judge, I lay claim to no right to annul an act of the legislature, because I deem it unwise or impolitic, or because it does not square with my notion of natural equity and justice. I claim and shall show that the present act violates express provisions of the constitution.

Many unwise laws, and many laws unjust in their operation, are, nevertheless, no infractions of the constitution. The wisdom of the legislature does not measure the power of the legislature. Natural equity, as Cicero happily observes, is "the reason of God," made so plain, let me add, that sooner or later all can understand it. Justice has her imperial seat in the bosom of every man — on these, and not on specific constitutional provisions, must reliance be had in many cases of indefensible legislation — the remedy being to secure a repeal of the law and not its judicial annulment.

But when a law is a plain and clear violation of a constitutional provision, it is the duty of a judge so to declare, be the consequences what they may.

Of what value, indeed, would be the boasted American idea of securing private rights, and the rights of the minority (for it is usually the minority, and not the majority, that needs protection) by constitutional limitations on the power of the legislature, *i. e.*, on the power of the majority, if no tribunal existed to decide when the legislature disregarded these limitations, or if the tribunal charged with this most delicate yet most important duty failed fearlessly to perform it.

I proceed to show wherein the act of 1868 violates the positive and express provisions of the constitution of the state.

I first turn to the constitution of the state, to ascertain what property rights are thereby secured to the citizen beyond the reach of legislative power.

By section one (1) of the bill of rights it is declared, that: "All men have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property," etc.

Section nine (9) of the bill of rights, borrowing the substance of a leading provision of *magna charta*, declares, that: "No person shall be deprived of life, liberty or property, without due process of law."

Section eighteen (18) of the bill of rights, relating to the right of eminent domain, declares, that: "Private property shall not be

taken for public use without just compensation being first made, or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

The last section (25) of the bill of rights is, that this: "enumeration of rights shall not be construed to impair or deny others retained by the people."

It will thus be seen that the right of the citizen to his property is secured by guarantees, as many and as high as his right to his liberty or his life.

The constitution recognizes and establishes the inviolability of private property, and wisely so, since few interests take a deeper hold on man than those which relate to property. Much of the general prosperity, and much of the unexampled activity, energy and enterprise, which distinguish the present era, is due to the all-prevailing conviction that private property is secure.

In what way may the legislature lawfully interfere with private property? In the light of adjudications, I answer, in the following:

1. It may authorize it to be forfeited for crime, or sold for the owner's debts judicially established, or in pursuance of judicial proceedings.

2. It may take it for *public* use, under the power of eminent domain, but only on condition of making just compensation *in money*.

For any *private* use the legislature cannot touch the property of the citizen even if it does make compensation. This doctrine is established, and the authorities which declare and sustain it will be found referred to in the recent case of *Bankhead v. Brown*, 25 Iowa, 540.

3. It may, under peculiar circumstances, condemn it under the *police power*, when the property, or its use, or situation, is such as to endanger the public health, welfare or safety. *Salus populi suprema lex*.

4. It may be taken by virtue of the *taxing power*.

Except in these modes, and for these purposes, private property is inviolable — is beyond the reach of the legislature.

As the statute under consideration requires the property of the citizen by virtue of the *taxing power*, and that alone, the other modes in which the legislature may interfere with private property do not now concern us.

The nature and extent of the taxing power must now be considered.

Since, as above shown, "every man holds his property subject to the taxing power" of the state (per WOODWARD, J., in *Philadelphia v. Tryon*, 35 Penn. St. 401, 404), no question can be of greater moment to the property owner than the one: *what is taxation, and for what purposes may property be lawfully taxed?* This subject is one which I have examined with all the care within my power. In none of the many discussions in the courts to which the railway subscription question gave rise, was this subject examined with that power and fulness which it doubtless would have occasioned had the sole question been, what may the legislature do under the power to tax? It would require too much space to review the many decisions on this subject, and to show the truth of this remark.

Prior to the *Sharpless Case*, before referred to, the following cases had been decided holding the validity of municipal subscriptions to the stock of railways. *Goodin v. Crump*, 8 Leigh (Va.), 120, 1837; *Bridgeport v. R. R. Co.*, 15 Conn. 475, 1843; *Nichol v. Nashville*, 8 Humph. (Tenn.) 252, 1848; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526, 1849.

In some of these, the nature of the taxing power is not alluded to, and in the others it is not discussed with any considerable care.

I admit that, in the *Sharpless Case*, 21 Penn. St. 147, the court examined this subject at length, but, as not less than fourteen millions of stock had then (1853) been taken, and bonds issued on the faith of the legislation of 1848, the court were almost forced to sustain the authority, which was done, however, by a bare majority of the judges. *Commonwealth v. McWilliams*, 11 Penn. St. 61, 72. There was also less difficulty in sustaining this legislation, because the supreme court of that state, under the influence of Chief Justice GIBSON, had before enunciated extreme notions as to the extent of the legislative power—*notions, some of which are not law elsewhere, and which practically invest the legislature with despotic power.* In illustration of what I mean, I refer to the following cases: *Eakin v. Raub*, 12 Serg. & R. 344; *Harvey v. Thomas*, 10 Watts, 63; *Pocopson Road*, 16 Penn. St. 15; *Kirby v. Shaw*, 19 id. 258.

The period intervening between 1853 and 1857, was one of apparent general prosperity, and characterized by great activity in railroad enterprises; and other courts, in which the question of the power of public corporations to subscribe to the stock of railway

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companies subsequently arose, took shelter under the *Sharpley Case*, and those that preceded it.

But, as I have before said, it may be admitted that those decisions can be sustained without the admission necessarily involving a concession that the act under consideration is within the constitutional power of the legislature.

I now proceed to examine the nature and extent of the legislative power to tax. I think I shall be able to convince the impartial judgment of any lawyer or intelligent man, that the act of 1868 is not a valid or legitimate exercise of the taxing power; that though the money demanded of the citizen is called a *tax*, it is not such; but is, in fact, a coercive contribution in favor of private railway corporations, and violative, not only of the general spirit of the constitution as to the sacredness of private property, but of that specific provision which declares *that no man shall be deprived of his property without due process of law* (Bill of Rights, § 9),—a provision which is adequate to protect the owner from being despoiled of his property by an unauthorized tax law or illegal tax. See Cooley on Const. Lim. p. 487; also pp. 479, 521, and cases cited.

In examining the legislative power to tax, I may not extend this opinion by taking the time to trace, at any length, the history of taxation, although it is a topic full of interest, and one which sheds no little light upon the subject in hand. It must suffice to state, that regular and systematic taxation, by means of law, is of modern origin. In feudal times, the sovereign was maintained by the revenues of his domain, and supported in war by his military vassals. When feudalism decayed, and the wants of government increased, other sources of revenue became necessary. Before the modern system of regular and equal taxation was settled, resort was had to forced loans, to confiscations, the sale of monopolies, etc. These arbitrary proceedings led, in England, to a long and memorable struggle, in the course of which Charles I lost his crown and his life, and James II was driven from the realm, and which resulted in the solemn establishment of the principle now firmly imbedded in the English constitution, that there can be no lawful taxation without the consent of the people, represented in parliament. This principle has been universally adopted in this country. So that, while taxation is an incident, or attribute, of sovereignty, it can only be exercised by the authority of the legislature. Our constitution (art 3, § 1) vests "*the legislative authority* of the

state in the general assembly." As taxation is a legislative power it passed to the legislature by this general grant of legislative authority. So far there is no dispute.

The next step in the inquiry is, *what is the taxing power?* I answer, the power to levy and collect taxes, and assessments in the nature of taxes.

What are taxes? This is the question which lies at the heart of the present case. I answer, that, by the concurrent opinion of lawyers, judges, lexicographers and political economists, as well as by the general and popular understanding, *taxes are burdens or charges imposed by the legislature upon persons or property, to raise money for public purposes, or to accomplish some governmental end.* Some of the many authorities for this doctrine or definition are cited in a note;* but I do not stop in the thread of my argument to quote from them. I add, that no authority, nor, as I believe, even *dictum*, can be found, which asserts that there can be any legitimate taxation where the money to be raised does not go into the public treasury, or is not destined for the use of the government, or some of the public governmental divisions of the state. In other words, a *public governmental use or purpose* is involved in, and is essential

* A tax is a portion of the property of individuals which is taken from them by the government, and disposed of by it. 31 Ency. Britt. 37.

Tax.—A rate or sum of money assessed on the person or property of a citizen, by government, for the use of the nation or state. Webst. Dict.

Taxes are contributions paid by the inhabitants of a country for the use of the government. New Am. Ency., vol. 15, p. 307.

A tax is generally understood to mean the imposition of a duty or impost for the support of government. *Pray v. North. Lib.*, 31 Penn. St. 69.

Taxes are burdens or charges imposed by the legislature upon persons or property, to raise money for *public purposes*. Cooley on Const. Lim. 479.

Again, Judge Cooley remarks (id. 487): "*Taxation having for its only legitimate object the raising of money for public purposes and the proper needs of government, the exaction of money from the citizen for other purposes is not a proper exercise of the power, and must, therefore, be unauthorized.*" I invite attention to the entire remarks of this able and distinguished jurist in this connection.

A tax was anciently defined to be a certain aid, subsidy, or supply granted by the commons of Great Britain, and constituting the king's revenue. 4 Inst. 216-233. As the name imports, from its derivation, it means tribute, and belonged to the king's treasury. *And I think the common mind has everywhere taken in the understanding, that taxes are a public imposition levied by authority of the government, for the purpose of carrying on the government in all its machinery and operations; that they are imposed for a public purpose.* Per COULLEN, J. in *North Lib. v. St. John's Church*, 13 Penn. St. 104, 107, 1850.

Taxation is the mode of raising money for *public purposes or uses.* *Matter of Mayor of New York*, 11 Johns. 77, and authorities cited; Blackw. on Tax Titles, ch. 1, p. 77 (1st ed.)

A tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state. It is not founded upon contract or agreement. It operates in *medietate*. Per Chief Justice GRAY, *Camden v. Allen*, 3 Dutch. 393.

to, the idea of a tax. "I concede," says BLACK, Ch. J., in *Sharpless' Case*, 21 Penn. St. 167, "that a law authorizing taxation for any other than public purposes is void." Again he says: "A tax for a *private* purpose is unconstitutional, though it pass through the hands of public officers." This is undoubtedly true. The reasons why such legislation is void will presently be stated.

A tax for a *private* purpose is, to use the strong yet apt expression of LOWE, J., in the *Wapello County Case*, 13 Iowa, 405, "a solecism in language."

That taxation must have reference to the raising of money for *public*, as distinguished from *private*, uses and ends, appears from the nature of the power and the manner in which it is exercised. Other laws are based upon convenience; but tax laws are based upon an imperative political necessity, for without revenue there can be no regular government, and without taxes no revenue. In theory the tax payer receives a compensation for the taxes paid, in the protection the government affords him. This is theoretically true; but, still, the foundation of the taxing power is political necessity, and taxes are in effect, as Mr. Mill contends, sacrifices made for the public good, "equality of sacrifice" being the rule dictated by justice. 2 Pol. Econ. 370, 372.

It is the circumstance that taxes are contributions demanded for the *use of the government*, and not for private uses, that confers upon the power to tax its peculiar character.

It extends to all the property and all the persons within the jurisdiction of the state.

For the non-payment of a lawful tax, the property of the citizen may, without any judicial proceedings, and without personal notice to him, be sold to pay it. Proceedings so rigorous are anomalous in the law, and justify the remark of the supreme court of Pennsylvania, that the divestiture of ownership by tax laws, and sales thereunder, exhibit "the instance in which a constitutional government approaches most nearly to an unrestrained tyranny." *Gaulf's Appeal*, 33 Penn. St. 94, 97, 1859.

It is only because *taxes* are for the use of the public—of the government or some of its auxiliaries—that these severe and stringent laws are not condemned as cruel and despotic, and as infringements of constitutional rights.

Again, that taxation contemplates only the raising of money for

public ends and uses is further shown by the extent, *as respects the rate and amount*, to which it may be carried.

"If the right to impose a tax exists," says the supreme court of the United States, "it is a right which, in its nature, acknowledges no limits" *Weston v. Charleston*, 2 Pet. 449; *Bank of Commerce v. New York City*, 2 Black, 631; see also *Warren v. Paul*, 22 Ind. 279; *Herrick v. Randolph*, 13 Vt. 529; Sedgw. Const. Law, 554, 555; Cooley Const. Lim. 482, 483, and cases cited.

Why is legitimate taxation without limit? Because the needs of the public or the necessities of the government can have no bounds set to them. Unless there is some limit fixed in the constitution, the state may, for any legitimate purpose, tax property to its full value.

"The power to tax," says Chief Justice MARSHALL (*McCulloch v. Maryland*, 4 Wheat. 431), "involves the power to destroy," that is, by the levy of a tax equal in amount to the value of the property taxed; so that, if the present law, which authorizes a five per cent tax for the benefit of a railroad company, be constitutional, then a law authorizing a tax of one hundred per cent for a similar purpose would likewise be valid.

The point I make in this branch of my argument is, that in view of the nature of the taxing power, extending to all persons and all property, without limit as to rate or amount, involving, indeed, the power to destroy; the right to sell without notice and without judicial proceedings,—it is against reason to suppose that any such power exists, in order to raise money from the unwilling citizen for the benefit of a private corporation.

The supreme court of the United States, have correctly said that there is no limitation (in the absence of express provisions of the state constitutions) upon the legislative power of the states, as to the *amount* (rate) or *objects* (the property subject to be taxed) of taxation. *Providence Bank v. Billings*, 4 Pet. 514.

But no court has ever said that there is no limitation upon the legislatures as to the *purposes* for which a tax could be authorized.

The case is precisely like that arising under the power of eminent domain. The right to take private property, so far as necessary for public use, knows no bounds, provided compensation be made.

Respecting the *expediency* of exercising the power of eminent domain, the legislature is the sole, final and uncontrolled judge; this being a political and not a judicial question. But whether the

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use for which the statute proposes to take the property of the citizen be *public* or *private*, is a judicial question, concerning which the determination of the legislature, while entitled to great respect, is not conclusive. *Bankhead v. Brown*, 25 Iowa, 540, and cases cited.

The act of 1868 presents the case of the levy of a tax for a specific, designated purpose. Whether this purpose be *public* or *private*, whether the money thus required is in the nature of a tax, or is an illegal exaction under the name and guise of a tax, are judicial questions.

So that the controversy is now narrowed down to this single point: Does the act of 1868 authorize a tax to be levied and collected for *private* purposes? If so, it is not a tax, for the reasons before stated, and the statute is void, since it seeks, in violation of the bill of rights, to deprive a person of his property *without due process of law*.

It is a well settled principle of American constitutional law that an act of the legislature may be unconstitutional in two ways: first, because it assumes or seeks to confer power not legislative in its nature; or, second, because it violates some specific provision of the national or state constitution. *Commonwealth v. Maxwell*, 27 Penn. St. 444, 456; *Mott v. Pennsylvania Central R. R. Co.*, 30 id. 9, 37, per KNOX, J.; Sedgw. Const. Law, 174, 175, 515; *Taylor v. Porter*, 4 Hill (N. Y.), 140, per BRONSON, J.

The act of 1868 is, in my opinion, unconstitutional in both of these ways. Because it appropriates private property to private purposes, it is not in the nature of a law, and, therefore, deprives the citizen of his property without due process of law.

I adopt, as expressive of my views, the language of Mr. Justice BRONSON, in *Taylor v. Porter*, 4 Hill, 140, whose opinion, I may remark, has Mr. Sedgwick's weighty indorsement, as "a clear, accurate and sound exposition" of constitutional law. Sedgw. Const. Law, 155, note. The legislature of New York had undertaken to authorize the condemnation of private property for *private roads*. In holding that this cannot be done, he observes: "The security of life, liberty and property lies at the foundation of the social compact; and to say that the grant of legislative power includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which governments were established
* * "They (the legislature) cannot take the property of A., either

with or without compensation, and give it to B. The 'legislative power of this state' does not reach to such an unwarrantable extent. Neither life, liberty nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of legislative power."

On this ground, and on the ground that the act in question deprived the citizen of his property without "due process of law," and against "the law of the land," it was held unconstitutional and void.

This case was subsequently cited with approbation in *Powers v. Bergen*, 2 Seld. 358, and was followed and approved in a similar case by this court in *Bankhead v. Brown*, before cited.

It is established by the foregoing principles and authorities, that, unless the tax authorized by the act of 1868 is one laid for *public purposes*, the law cannot be sustained.

I argue, that it is not a tax laid for *public purposes*, because the donee thereof is a mere *private* corporation, voluntarily organized for pecuniary profit, and whose ultimate business is that of a mere common carrier. The "leading features and characteristics of a railroad corporation," in respect to its private character, are so well portrayed in the *Wapello County Case* (pp. 400-402), that it is really unnecessary to do more than to refer to it as correctly expressing the law on this point. If the legislature could abolish railroad corporations, restrict their chartered powers, and control their rights and property, the same as they can do with respect to municipal or civil corporations, there would be some ground for holding that they were not essentially private. If these corporations are not private, then they are *public*, and, if public, they are subject to the unlimited control of the legislature, which may enlarge or restrict their rights and powers, or even abolish or destroy them, at its pleasure, a doctrine, the correctness of which these corporations would, in any other case, be the last to admit. That such corporations are private, and not public, is a principle of law so well settled that it has not even been questioned by counsel. No case can be found which denies it.

It is to be remembered, also, that railway corporations are not organized for the purpose of developing the material prosperity of the state; this is a mere incident of the business they prosecute. But they are organized solely to make money for their stockholders; and the legislature have no more power over their property or right:

than it has over the like property and rights of natural persons, or other private corporations organized under the same general law.

How it can be said that the voluntary use of private capital, for the exclusive advantage and profit of those who contribute it, is a *public use* of it, justifying compulsory taxation in favor of the private undertaking, surpasses my ability to understand.

Because the legislature does not, and indeed cannot, compulsorily organize persons into a railway corporation, but their action in forming such a corporation is, and must be, purely voluntary; because the state cannot compel a railway company, in the absence of a contract on its part, to build its road, but it may abandon its enterprise at pleasure; because the state does not own the stock, but the same is the private property of the stockholders; because the state is not liable for the torts or the contracts of railway companies; because it derives no dividends or profits from the operation of the roads, but the same belong wholly to the stockholders,—it follows that railway corporations are purely private, and their undertakings can no more be aided by taxation than can the private undertakings of any other corporation, or of an individual. All corporations are created or authorized by the legislature because of the supposed public benefit that will result therefrom; but the notion that, therefore, it is competent to *tax* the citizen for the benefit of such corporations is entirely of very modern origin, is subversive of private rights, and, in my judgment, dangerous beyond conception. *Ten Eyck v. Canal Co.*, 3 Harr. (N. J.) 200, 203.

I notice, in conclusion, a few of the more plausible objections to the soundness of the foregoing views.

It is argued that taxes authorized by the law under consideration are levied and collected for public purposes because the right of eminent domain can be exercised in favor of railroad companies. There is plausibility enough in this suggestion to justify an answer to it.

It overlooks the fact that the taxing power and the right of eminent domain are, though in some respects kindred, essentially different.

Property may be taken under the taxing power without making any direct compensation whatever, the foundation of this power being, as above shown, in an absolute political necessity, the compensation to the tax payer being merely theoretical and incidental. Property, by virtue of the power of eminent domain, can only be

taken when direct and full compensation is made in money, and can only be taken to the limited extent required by the object in favor of which it is exercised. The leading case on this subject is *The People v. Brooklyn*, 4 Comst. 423, 425, where the distinguishing attributes of the two powers are very clearly stated by Mr. Justice RUGGLES.

The two powers being different, it does not follow that a tax can be levied for the benefit of any private enterprise, though the enterprise be one which would justify the exercise of the right of eminent domain.

Because the legislature may take enough of A.'s land to enable a railroad company to build its road, provided A. be paid in money the full value of the land, and any additional damage that the taking may do him, it does not follow that A. can be taxed to build the road without receiving or being entitled to any return for the money he is thus compelled to pay. The cases are obviously different.

The difference may be exemplified by an example or two, derived from actual adjudications.

Under the right of eminent domain, it has been held, by the supreme court of Massachusetts, that, on making compensation to the owner, land may be compulsorily taken for the establishment of a great mill power for manufacturing purposes. *Hazen v. Essex Co.*, 12 Cush. 475, 477. It has also been held, that land may be thus taken for a public grist-mill (*Harding v. Goodlet*, 3 Yerg. 41), and for mill-dams (*Newell v. Smith*, 15 Wis. 101), and the like. We have also statutes authorizing the condemnation of property for bridges and works of internal improvement (Rev. ch. 54, 55), and authorizing mill-dam owners, on paying damages, to flood the supra-riparian proprietors. Rev. 211.

Conceding, for the argument, that these and similar decisions and statutes are sustainable, will it be contended that citizens can be taxed, and against their consent compelled to pay money to a man, or company, or private corporation, proposing to erect "a great mill power for manufacturing purposes," or "a public grist-mill," or to re-imburse mill owners the amount which they will have to pay under the *ad quod damnum* act?

If this is not claimed, then the argument I am answering, viz., that there is a right to tax where there is a right to exercise the power of eminent domain, is shown to be unsound. If this is

claimed, then the startling and dangerous consequence to which the proposition leads equally demonstrate its unsoundness.

Our statute (Rev. § 1278) authorizes "any person or corporation designing to construct a canal, or a railroad, or a turnpike, graded, macadamized or plank road, or a bridge, as a work of public utility, although for private profit, to take such reasonable amount of private real estate as may be requisite for a right of way not exceeding one hundred feet wide, upon paying therefor," etc. Can the legislature tax the citizen and compel him to assist "any person or corporation" designing to construct such works for private profit? Who is bold enough to claim it? I deny that it can be done. The property that can be taken by the exercise of the right of eminent domain is restricted to the actual amount required to execute the undertaking, and is generally limited to one hundred feet in width, and full value in money must be paid. This itself is a check against the abuse of the power. But the amount of tax that may be levied is unlimited, and no return or compensation to the tax payer is contemplated. Indeed, the very object of the act of 1868 is to get the money of the property owner without being obliged to make any compensation to him therefor.

Again, it is urged in support of the act of 1868, that railways are simply improved highways, and that taxes in aid of their construction stand upon the same principle as ordinary road taxes; that since the state might itself build a railroad and pay for it out of the public revenues raised by taxation, so it may, if it chooses, authorize such taxes in aid of private railway corporations. This argument is unsound. The ordinary highway is the common property of all, for the common use of all, and the jurisdiction and control over it on the part of the legislature, as the representative of the public, is absolute and unlimited. In all of these respects a railway is different.

That because the state may itself build a railway and own it, (see however, art. 7, of constitution), it is a *non sequiter* to suppose it can authorize the citizen to be taxed for the benefit of a private corporation organized for pecuniary profit.

Let me illustrate. The state may levy a tax to support common schools. Can it levy a tax, or authorize a majority in a town or city to vote a tax to support the private school kept by Mr. A. or B.? I think not. Other illustrations will readily suggest themselves.

and I will say no more in response to this argument, except to refer to the answer it received in the *Wapello County Case*.

Some argument in favor of the validity of the act under consideration may, it has been suggested, be drawn from the fact that courts have sustained laws authorizing the giving of bounties to soldiers volunteering to defend the country in time of actual war, and the levying of taxes to pay such bounties. I believe the difference between such a case and that of a compulsory donation to a private railway company is so distinctly pronounced and obvious that I may safely leave the argument to answer itself.

The legislation under consideration is, I think, to be distinguished, on the principle involved, from the ordinary case of municipal assessments for local public improvements, such as sidewalks, etc., and is not necessarily identical with that in which the legislature has authorized some specific public works, such as draining marshy lands, to be done through the intervention of a company, and the expense assessed upon the lands benefited. *Draininy Co. Case*, 11 La. Ann. 338.

Nor will a denial of the constitutionality of the act of 1868 be equivalent to holding that the legislature could not, if it deemed it for the public good, and complied with the requirements of the constitution (art. 3, § 31), give public aid to local or private objects.

Such a case is contemplated by the constitution, and the legislature in exercising this power decides that the object aided deserves public assistance; a very different case from a general act authorizing a majority of a local district to vote a tax as a bounty to a private railway corporation.

I will not further elaborate the argument. The legislation in question cannot be sustained. It is the duty of a judge to look at this statute in the light of the principle which gives to it its distinctive character.

The court cannot uphold the tax in question without sanctioning the following principle, viz.: *That it is competent for the legislature, because of the incidental advantage which would result to the community from the carrying out of the objects of a voluntary private railway corporation, organized for pecuniary profit, to authorize a tax to be levied on the citizen and his property, to be given as a bounty to such private corporation, to be used in aid of its undertakings, without any pecuniary compensation to the tax payer being contemplated or provided.* Such a doctrine would unsettle the

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foundation of private rights. The citizen would no longer own his property in fee simple, but hold it as a tenant at the will of the majority of the local community in which it is situated.

If, because of the incidental advantage to the community resulting from the construction of its road, and the pursuit of its business by a railroad company, the citizen and his property may be specially taxed to aid such company to execute its undertaking, who can define the logical boundaries to this doctrine? Who can fix the limits to this kind of taxation? Who can foresee the consequences of such a decision? Railroad enterprises are not the only ones that would result in a consequential benefit to the public. On the contrary, political economists tell us, and our reason and observation confirm it, that agriculture, commerce, the mechanic arts, in a word, every department of labor and every industrial pursuit, promotes the public good by advancing the public prosperity. Manufactures of various kinds are scarcely less needed in Iowa, to-day, than railroads. As in the case of railroads, it requires large capital to build and operate them. Can the legislature authorize a tax as a bounty or gratuity to private persons or corporations proposing to erect manufactories? That it could authorize this, or any like taxation, could not be denied, were the present legislation sustainable. One of the counsel has drawn, in eloquent terms, a graphic picture of the disastrous effects, in retarding the growth and development of the State, of holding the act under consideration to be invalid. As such considerations have no place in the judicial determination of the question, except to superinduce greater care and more sedate deliberation, I dismiss them, with an expression of my disbelief in the dangers which are apprehended, of my skepticism in the healthfulness of an artificial growth caused by the unnatural stimulus of public taxation in favor of private enterprises, and of my firm conviction that any benefits resulting from a different holding would be dearly purchased at the expense of the fundamental rights of the citizen. This opening once made in the barriers which the constitution has erected to protect private property, who is so wise as to foretell what troops of foes may not hereafter enter at the same breach? And who, in such an event, will be strong enough to prevent it? My convictions as to the illegality of the law are clear and decided, however imperfectly I may have expressed and vindicated the grounds on which they rest.

I entertain no doubt, however the decision of the court may, for

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the present, be regarded or regretted, that, finally, the professional and general judgment of men will assent to its correctness, and that its views as to the inviolability of private property, and as to the nature and legitimate purposes of taxation, will be laid up among the fundamental, acknowledged and cherished axioms of American constitutional law.

It follows that, in my judgment, the plaintiffs were entitled to the maintenance of the injunction they had procured, and that the court erred in dissolving it.

NOTE.—WHEAT, J., and BRON, J., each delivered an opinion concurring in their conclusions with the chief justice, and COLK, J., delivered a dissenting opinion.

In 1870, the general assembly passed an act (ch. 108) containing similar provisions with the one passed upon in *Hanson v. Vernon*, and that act was subsequently brought before the supreme court for adjudication in the case of *Stewart v. Supervisors of Polk Co.* As the court in the latter case overruled their decision in the former, we believed it better to insert the decision here instead of waiting for its appearance in the regular reports. The decision is copied from the *Western Jurist* for November, 1870.

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*Constitutional law—when acts of legislature may be declared unconstitutional.
Right of legislature to tax in aid of railroads.*

Courts of justice are authorized to declare a legislative act unconstitutional and void, only when it violates the constitution, clearly, palpably, plainly and in such a manner as to leave no reasonable doubt.

The right to exercise the power of eminent domain in behalf of railroads and other improvements of public utility is recognized by all the courts and denied by no one. The right to take private property under this power for public use is conditioned upon making compensation.

The taxing power being one of the sovereign powers vested in the general assembly by the people, and not being limited either expressly or by clear implication in the constitution to the condition of making compensation, the judicial power possesses no authority to thus limit it.

As the legislature may constitutionally exercise the right of eminent domain, which is limited by the constitution, in aid of the construction of railroads etc., so also may it exercise the taxing power which is not thus limited.

APPEAL from the order of the judge of the Polk district court.

Petition in equity, by the plaintiff, a property owner, against the board of supervisors of Polk county, for an injunction to restrain

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the levy of a tax voted by the qualified electors of Des Moines and Lee townships respectively, in said county, under an act of the General Assembly, approved April 12th, 1870, entitled "an act to enable townships, incorporated towns and cities, to aid in the construction of railroads."

The petition was presented to the judge of the district court—Hon. H. W. MAXWELL—in vacation. The defendants appeared and filed an answer, and, on a hearing, the injunction was refused, from which refusal the plaintiff appeals.

Barcroft & Gatch, for plaintiff.

Polk & Hubbell, for defendant.

MILLER, J. The case before us raises the question of the validity of chapter 102 of the laws of the thirteenth general assembly, granting local aid to railroads.

No question of superior importance and gravity is ever presented to the courts for adjudication than one involving the validity of an act of the legislative department of the government, and none demands more careful examination and serious consideration in its determination.

This is peculiarly true in this case, inasmuch as an act of like character to the one under consideration was held void by a majority of this court in *Hanson et al. v. Vernon et al.*, June term, 1869, and that a subsequent general assembly, by the passage of the act of April, 1870, re-asserted the power denied them in that case.

If this case but involved a second time the validity of the act of 1868, annulled by this court in the case referred to, we might regard the question as to *that* act, settled by that case, but as the general assembly has re-asserted its authority, and re-enacted the law with important modifications, we have treated the question as still an open one, and have given it as full and careful examination and consideration as we are capable of.

The first section of the act declares "that it shall be lawful for any township, incorporated town or city to aid in the construction of any projected railroad in this state, as hereinafter provided."

"SEC. 2. Whenever a petition shall be presented to the council or trustees of any incorporated township, city, or trustee of any township, signed by one-third of the resident tax-payers of such

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township, city or town, asking the question of aiding in the construction of any railroad to be submitted to the voters thereof. it shall be the duty of the trustees, or council, or board of trustees, to immediately give notice of a special election, by publication in some newspaper published in the county, if any be published therein, and also by posting said notice in five public places in each township, city or town, at least twenty days before said election, which notice shall specify the time and place of holding said election, the line of road proposed to be aided, the rate per centum of tax to be raised, and the township or townships, incorporated town or city, in which such tax shall be expended; at which election the question of "taxation" or "no taxation" shall be submitted, and if a majority of the votes polled be "for taxation," then, in that case, the township clerk, recorder, or clerk of said election shall forthwith certify to the county auditor the rate per centum of the tax thus voted by such township, city, or town. The board of supervisors shall, at the time of levying the ordinary taxes next following said special election, levy all taxes voted under the provisions of this act, and cause the same to be placed on the tax lists of the proper townships, cities or towns, and said taxes shall be collected at the same time, in the same manner, and be subject to the same penalties for non-payment, as other taxes: *Provided*, That the aggregate amount of tax levied under the provisions of this act, in any township, city or town, shall not exceed five per centum of the assessed value of the property of said township, city or town.

"SEC. 3. The funds collected under the provisions of this act shall be paid out by the county treasurer to the treasurer of the railroad company, upon the orders of the president or managing director of the railroad company, whose road such tax has been voted to aid; which orders shall be accompanied by sworn estimates of the engineer in charge of the work on such road, showing that double the amount of such orders has been expended for the construction of such road, in accordance with the terms of the notice provided for in section two of this act, and also by a certificate, signed by the members of the council, or board of trustees, or a majority of the members thereof, of the township, city, or town voting the tax for which said orders are drawn, to the effect that the provisions of this act have been so complied with as to entitle said company to the amount called for by such orders; and it is hereby expressly provided, that no part of the funds raised under

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the provisions of this act shall be expended in any other townships than those specified in the notice of election: *Provided, however,* That should the taxes not be drawn from the county treasury in accordance with the provisions of this act, by the railroad company in whose favor the same may have been voted, within two years after the date of the collection thereof, then the right of said railroad company to said funds shall be deemed forfeited, and the same shall be repaid by the county treasurer to the persons from whom the same may have been collected.

"SEC. 4. All railroads constructed by or with the aid of any taxes levied and collected under the provisions of this act shall be subject to the control of the general assembly, in regard to the management of the same and the charges for the transportation of freight and passengers thereon."

The authority and power of the courts to annul an act of the legislature, in conflict with the fundamental law, has been repeatedly asserted and is now universally acknowledged. While this authority is unanimously conceded, the cases, with entire uniformity, hold that it is never to be exercised in doubtful cases.

The supreme court of New York, in *Clark v. The People*, 26 Wend. 599, says, that "the power of the courts of justice to declare the nullity of legislative acts which violate the provisions either of the constitution of the United States or of the state, while it is undoubted, should be exercised with extreme caution, and never where a serious doubt exists as to the true interpretation of the provisions alleged to be repugnant.

In Illinois, it is said that the true inquiry is whether "the will of the representatives, as expressed in the law, is or is not in conflict with the will of the people, as expressed in the constitution, and unless it is clear that the legislature has transcended its authority the courts will not interfere. *Lane et al. v. Dorman et ux.*, 3 Scam. 238.

See, also, in support of this rule, the following cases: *Foster et al. v. The Essex Bank*, 16 Mass. 245; *The Farmers and Mechanics' Bank v. Smith*, 8 Serg. & R. 6975.

Many other cases might be cited, but I forbear, as this court has frequently declared the same doctrine.

In *Santo v. The State*, 2 Iowa, 208, it is said by Mr. Justice WOODWARD, that "although the power is universally admitted, its exercise is considered of the most delicate and responsible nature,

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and is not resorted to unless the case be clear, decisive, and unavoidable. It is the duty of the court to give an act such construction, if possible, as will maintain it; citing *Rice v. Foster*, 4 Harring. (Del). 479; *Fisher v. McGin, etc.*, 1 Gray, 1; *Maize v. The State*, 4 Ind. 342; *Commonwealth v. Williams*, 11 Penn. 61; *State v. Cooper*, 5 Blackford, 258; 2 Peters, 522; *Ogden v. Saunders*, 12 Wheat. 270; 19 Johnson, 58; 1 Conn. 550; *Calder v. Bull*, 3 Dall. 386; *Fletcher v. Peck*, 6 Cran. 87.

In the case of *Morrison v. Springer*, 15 Iowa, 304, this court held, that it "will declare a law unconstitutional *only* when it is *clearly, palpably and plainly inconsistent* with the provisions of that instrument"; and Mr. Justice WRIGHT, in his opinion in that case, cites a long list of authorities in support of the rule announced.

See, also, *McCormick v. Rush*, 15 Iowa, 127; *Whiting & Whiting v. City of Mt. Pleasant*, 11 Iowa, 482-485; *McGregor v. Baylis*, 19 Iowa, 43; *Duncombe v. Prindle*, 12 Iowa, 1.

The same rule of construction has been declared in Massachusetts, Pennsylvania, and other states. *Adams v. Howe*, 14 Mass. 347; *Sharpless v. The Mayor, etc.*, 21 Penn. 162; *Thorp v. R. R. Co.*, 21 Vt. 142; *The People v. Draper*, 15 N. Y. 543.

Having seen that courts of justice are authorized to declare a legislative act unconstitutional and void, only when it violates that instrument, *clearly, palpably, plainly*, and in such a manner as to leave no reasonable doubt, we proceed to inquire whether there is any checks on legislative power, independent of, or in addition to, those which are to be found in the constitution, or, in other words, whether the courts possess the power to annul an act of the legislature for any other reason than that of its *plain, clear and palpable* violations of the *written* constitution.

It is said that "the judiciary may arrest acts of the legislature on the ground that they are unjust and immoral;" "that there are certain principles of natural justice which not even the legislature can be permitted to disregard." It is conceded, that the power of the legislature must be confined to "making laws." It cannot administer or execute them. So the very words of the constitution which vests the power of legislation in the general assembly, exclude the judiciary from any share in it; and such share they will undoubtedly possess if they are at liberty to refuse to execute a statute, on the grounds that it is not in harmony with their notions of morality and justice. Mr. Sedgwick, in his work on statutory

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and constitutional law, says: "Constitutional provisions may be ambiguous; the doctrine of interpretation is vague; but these branches of judicial authority are subject to some tests, and can be circumscribed within some limits. But who will undertake to decide what are the principles of eternal justice? And who can pretend to fix any limits to the judicial power, if they have the right to annul the operations of the legislature on the ground that they are repugnant to natural right? There may be, there always will be, questions, not only as to the expediency but the justice of laws. But questions of public policy and state necessity are not meant to be assigned to the domain of the courts. The right of construction, the right of applying constitutional restrictions, are vast powers, which it will always require great sagacity and intelligence to exercise. Let the judiciary rest contented with its acknowledged prerogatives, and not attempt to arrogate an authority so vague and so dangerous as the power to define and declare the doctrines of natural law and abstract right," in the construction of statutes. Sedg. on Stat. and Con. Law, 182.

These views of the learned author we approve and adopt. The same views are held by many of the soundest judges and legal writers.

Mr. Justice COWEN, of the New York supreme court, in *Butler v. Pilmer*, 1 Hill, 324, holds this language: "Strong expressions may be found in the books against legislative interference with vested rights; but it is not conceivable that, after allowing the few restrictions found in the federal and state constitutions, any further bounds can be set to legislative power by written prescription." And Chancellor Kent says: "Where it is said that a statute is contrary to natural equity or reason, or repugnant or impossible to be performed, the cases are understood to mean that the court is to give them a reasonable construction. They will not presume that every unjust or absurd consequence was within the contemplation of the law." 1 Kent's Com. p. 408.

And Mr. Justice BALDWIN, of the supreme court of the United States, used this language: "We cannot declare a legislative act void, because it conflicts with our opinions of policy, expediency or justice. We are not the guardians of the rights of the people of the state, unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by

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appeal to the justice and patriotism of the representatives of the people. If this fail, the people, in their sovereign capacity, can correct the evil; but the courts cannot assume their rights. There is no *paramount* and *supreme* law which defines the law of nature, or settles those great principles of legislation which are said to control state legislatures in the exercise of the powers conferred on them by the people in the constitution." *Bennett v. Boggs*, 1 Bald. 74, 75. See, also, in support of the same views, *Cochran v. Van Surley*, 20 Wend. 381; *Kirby v. Shaw*, 7 Harris (Penn.), 258; *State v. Dawson*, 2 Hill (S. O.), 100; *People v. Mayor of Brooklyn*, 4 Coms. 423; *Town of Guildford v. Cornell*, 18 Barb. 615; *Sharpless v. The Mayor, etc.*, 21 Penn. 147; *Braddee v. Brownfield*, 2 Watts & Serg. 271; *Harvey v. Thomas*, 10 Watts, 63; *Calder v. Bull*, 3 Dallas, 386; *Fletcher v. Peck*, 6 Cranch, 87; *Bloodgood v. Mohawk and Hudson R. R. Co.*, 18 Wend. 9; *Terrett v. Taylor*, 9 Cranch, 43; *Bonaparte v. Camden and Amboy R. R. Co.*, 1 Bald. C. C. 205.

There are authorities which hold the contrary doctrine, and, in doing so, usually take refuge behind that clause in the bill of rights which declares: "The enumeration of rights shall not be construed to impair or deny others, retained by the people."

Now let us inquire what legislative rights, other than those contained in the constitution, are "retained by the people."

The second section of the bill of rights declares: "*All political power is inherent in the people.*" Political power consists of the three great attributes of sovereignty, namely: *legislative, executive, and judicial* authority. This is *all inherent* in the people. These powers, then, are supreme in the people, in the first instance. *All the legislative*, as well as the executive and judicial power is inherent in them. By section 1 of article 3 of the constitution, we find that "The legislative authority of this state shall be vested in a general assembly," etc.

The people, then, have vested *the* legislative authority, *inherent in them*, in the general assembly. The people were the original possessors of *all* the legislative authority in the state. By this section they vest it *all* in the general assembly. Subsequently, in the same instrument, they withdraw some portions of this authority, and impose certain restrictions upon the exercise of the authority granted. It follows, therefore, as a logical sequence, that within these limitations and restrictions the legislative power of the general assembly is supreme; that it is bounded only by the limita-

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tions *written* in the constitution. WRIGHT, J., in *Morrison v. Springer*, 15 Iowa, 342, says: "The legislature clearly has the power to legislate on all rightful subjects of legislation, unless expressly prohibited from so doing, or where the prohibition is implied from some express provision. *This theory must never be lost sight of by the courts in examining the powers of the legislature. It is elementary, cardinal*, and frequently possesses controlling weight in determining the constitutional validity of their enactments. *The general assembly possesses all legislative authority not delegated to the general government, or prohibited by the constitution.*"

Thus it seems clear by logical deduction, and upon the most abundant authority, that this court has no authority to annul an act of the legislature, unless it is found to be in clear, palpable, and direct conflict with the written constitution.

We come now to inquire whether the act of 1870, authorizing local aid to railroads, is so *clearly, palpably* and *directly* in violation of our state constitution as that it becomes the province of this court to annul it?

It is urged that the act, in providing for the levy and collection of a tax, which when collected is to be paid over to a private corporation, is unconstitutional, on the ground that it conflicts with section 17, of the bill of rights," which declares: "Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof," etc. The argument is, that, by implication, the taking of private property for *private* use is forbidden by this section.

That the legislature has no constitutional authority to take the private property of A. and give it to B., there can be no reasonable doubt.

The difficulty, however, seems to be in ascertaining what is a *public use*, and what a *private use*, within the meaning of this section. This clause is a restriction upon the right of eminent domain. But for this restraint the legislature would have power to authorize the taking of private property for public use without making any compensation. The right to exercise the power of eminent domain *only* exists when the object is a public one. Every state exercises this power in behalf of railroads, turnpikes, canals, and other internal improvements, and this is done without reference to whether the state holds any pecuniary interest in the improve-

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ment or not. Upon our statute book will be found laws of this character. It has been the law of this state for twenty years without question, that "Whenever any corporation or other person designs to construct a canal or a railroad, a turnpike, graded, macadamized, or plank road, or a bridge, as a work of *public utility*, although for *private profit*, it may take such reasonable amount of private real property as may be requisite for a right of way, etc., upon paying such sum as may be assessed," etc. Revision of 1860, section 1278. See, also, the act of 1853, granting the right of way to railroad companies alone. Revision, page 218.

And it has been the law of this state for more than a quarter of a century, that any private citizen who will erect a mill to grind grain, for toll, may erect a dam and have a writ *ad quod damnum*, for the condemnation of the land overflowed, as for a public purpose. Laws of 1843, ch. 102; Laws of 1855, ch. 92 (Rev. sec. 1264); Laws of 1866, ch. 119.

The validity of these statutes, and that the purposes were *public* ones, within the meaning of the constitution, although, in the language of section 1278 of the Revision, it be "for *private profit*," has been too often and too uniformly recognized to be now disputed. See *Gammell v. Potter*, 6 Iowa, 548; *Lummery v. Bradley*, 7 id. 33; see, also, *Cowgill v. Essex Mill*, 6 Pick. 94; *Boston v. Newman*, 12 id. 466.

These acts can be sustained only on the ground that the objects to be promoted by them were *public*; that the exercise of the right of eminent domain in behalf of railroads, canals, turnpikes, plank roads, bridges, mills, etc., is upon the principle, that, being of "*public utility*," although for "*private profit*," they are for "*public use*," within the meaning of the constitution.

The cases are numerous and uniformly in accord with this view. The right of the legislature to exercise the power of eminent domain in behalf of railroads has always been upheld by the courts, on the ground that the *use was a public one*. Indeed, this is elementary and unquestionable. See 2 Kent's Com. 339, 340; *Beekman v. The Saratoga and S. R. R. Co.*, 3 Paige, 45.

The case last cited is the leading American case upon this subject. The point was expressly made, that taking *private* property for the use of a railroad was not taking it for *public use*, and therefore forbidden by the constitution of New York. The clear and conclusive

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language of the chancellor has often been quoted and followed, and never overruled.

In speaking of the power of eminent domain, he says: "The right of *eminent domain* does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, *where the public interest will be in no way promoted by such transfer*. But if the *public interest can be in any way promoted* by the taking of private property, it *must rest in the wisdom of the legislature* to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to interfere with the private rights of individuals for that purpose. It is upon this principle that the legislatures of several states have authorized the condemnation of the lands of individuals for mill sites, where, from the nature of the country, such mill sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. *Upon the same principle of public benefit*, not only the agents of the government, but also *individuals and corporate bodies*, have been authorized to take private property for the purpose of making public highways, *turnpike roads*, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. *In all such cases*, the object of the legislative power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of *corporate bodies or of individual enterprise*."

Chief Justice MARSHALL, in the case of *Wilson v. The Blackbird Creek Marsh Co.*, 2 Peters, 251, says: "Measures calculated to produce *such* benefits to the public, though effected through the medium of a *private corporation*, are undoubtedly within the powers reserved to the states."

In *Swan v. Williams*, 2 Mich. 427, the question before the court was, whether "property taken by a railroad company was a taking for *public use*, within the meaning of the constitution," and it was decided in the affirmative. Mr. Justice MARTIN, in that case, says: "Most certain it is, that, as to all their rights, powers, and responsibilities, *three* grand classes of corporations exist: 1. Political or municipal corporations, such as counties, towns, cities, and villages, which, from their nature, are subject to the unlimited control of

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the legislature; 2. Those associations which are created for the *public benefit*, and to which the government delegates a portion of its sovereign power, to be exercised for *public utility*, such as turnpike, bridge, canal, and railroad companies; and, 3. Strictly *private* corporations, where the *private interest* of the corporators is the *primary* object of the association, such as banking, insurance, manufacturing, and trading companies." "The *object* defines the *character* of these associations, by whatever name they may be styled."

The learned judge further says, that, in the creation of that class of corporations to which railroad companies belong, "the public duties and public interests are involved, and, in the discharge of these duties and the attainment of these interests, are the primary objects to be worked out through the powers delegated to them. To secure these, the right of pre-eminent sovereignty is exercised by the condemnation of lands to their use—a right which can never be exercised for private purposes. How, then, can they be regarded as *private* associations?"

"Nor can it be said that the property, when taken, is not used by the public, but by the corporation for its own benefit and advantage. It is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emoluments on the part of the corporators, but it is none the less true that the object of the government in creating them is *public utility*, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the service. If this be not the correct view, then we confess we are unable to find any authority in the government to accomplish any work of public utility through any private medium, or by delegated authority; yet all past history tells us that governments have more frequently effected these purposes through the aid of corporations and companies than by their immediate agents; and all experience tells us that this is the most wise and economical method of securing these improvements."

In support of these views, see the following cases: *Blodgett v. Mohawk & H. R. R. Co.*, 18 Wend. 1; 7 Pick. 496; 2 N. H. 25; 20 Johns. 442, 443; *Stewart v. Land*, 1 Cranch, 299; *Amboy Turnpike*, 5 Johns. Ch. 112; *Pratt v. Brown*, 3 Wis. 612; *Robbins v. R. R.*, 6 id. 636; *Soens v. Racine*, 10 id. 280; *Corpt. of N. Y. Coates*, 7 Cow. 585.

The right to exercise the power of eminent domain in behalf of railroads and other improvements of public utility is recognized by

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all courts, and denied by no one. While admitting this right, it is said that the legislature has no constitutional power to levy a tax on the property of the citizens in aid of a railroad corporation, because it is a mere private enterprise.

It has been abundantly shown that the *object* for which the right of eminent domain is exercised is a *public* one, for *public* utility, for "*public use*," within the meaning of the constitution; that this right can be exercised in behalf of these corporations upon no other ground. If, then, the building of a railroad is a public object so as to authorize the taking of the private real property of the citizen—the highest species of property—for a right of way, is it any less a public object, for the purpose of receiving aid through the medium of taxation, to assist in building the road upon such right of way? The right of eminent domain and the taxing power are both sovereign powers. The former is limited to *public uses* by express words in the constitution. The latter is not, nor is it limited at all except that the legislature shall not pass any law to compel any person "to pay tithes, taxes, or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry." Conceding, however, that the taxing power *ought* not to be exercised except in behalf of a public object, it is unquestionable that it *may* be exercised for public purposes—for any object that will justify the exercise of the right of eminent domain. If the state can, for any purpose, take the land of a citizen, it may tax him for a like purpose. The object or purpose should be a public one in either case. But it would be absurd to say that the right of the citizen to prevent his property from being taken for other than public uses, which is secured by express constitutional limitation, may be overridden, but that his right to save his money from being applied, through the process of taxation, to other than public uses, which right is *not* embodied in the constitution, must be respected. And yet such absurdity is involved in the position that the citizen's real property may be taken absolutely to aid in the construction of a private enterprise—a railroad—while his money cannot be taken by the process of taxation to aid in the same enterprise. The proposition that you may not tax the property-holder to aid the construction of a railroad, although the taxing power is not limited in the constitution, yet you may take his land for the same purpose, notwithstanding the right to thus take, is limited to "public purposes." If the taxing power cannot be constitutionally invoked in aid of

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railroads, neither can the power of eminent domain. If the act under consideration is in conflict with the constitution, in that it taxes the people in aid of the construction of railroads (or rather allows the people to tax themselves), then all the legislation of this and every other state, invoking the power of eminent domain in behalf of railroads, and other like internal improvements, are unconstitutional; and all the adjudication of the courts for more than a century, sustaining such exercise of the right of eminent domain, are based upon false premises, and are erroneous. To be consistent, we must hold these corporations, and the object and purpose of the creation, to be *private*, and that neither the power of eminent domain, nor the power of taxation, can be invoked to aid in their construction, or that they are created for *public utility*, to promote the public interest and convenience, and that both of these powers may be constitutionally exercised to aid in their construction. If they are *private* interests for the one purpose, they are also for the other; if they are public for one they are for the other. If the taking of private property for the right of way of a railroad is taking for "*public use*," so, also, is the imposition of a tax to aid in the construction of the road, an exercise of the taxing power for a *public purpose*. This view is in accord with the whole course of legislation of all the states, in regard to internal improvements, and is sustained by a current of judicial decisions that cannot be consistently repudiated.

Every railroad, canal and turnpike road in the United States has been built by the aid of such legislation — granting to them a right of way — based upon the principle that the *object* was a *public* one, justifying the invocation of sovereign power in their construction. This species of legislation, whether in the nature of grants of right of way to railroads, canals, and turnpikes, or by authorizing local aid, through the process of taxation, in their construction, has been sustained by the highest courts of almost every state in the union, upon this ground, and upon none other.

In addition to cases already cited herein, see the following: *Livingston v. Mayor of New York*, 9 Wend. 85; *In matter of opening Farnum street*, 17 Wend. 649; *Sutton's Heirs v. Louisville*, 5 Dana, 30; *City of Lexington v. McQuillen's Heirs*, 9 Dana, 513.

While the right to take private property for public use is conditioned upon making compensation, the taxing power is not thus limited. Indeed, the very idea of taxation implies the power to

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collect levies of money from the people without making any direct pecuniary compensation. The only revenue possessed by the state is derived from taxation; and it would be absurd to say that she should compensate the citizen for taxes collected.

It is well settled that this clause of the constitution, requiring compensation to be made where private property is taken for public use, is not a limitation upon the taxing power. See the following cases: *The People v. Mayor of Brooklyn*, 4 Coms. 413; *Town of Guilford v. Cornell*, 18 Barb., 615; *Town of Guilford v. Supervisors of Chenango County*, 3 Kern. 147; *Kirby v. Shaw*, 19 Penn. 258; *Williams v. Mayor of Detroit*, 2 Mich. 560; *McMasters v. Commonwealth*, 3 Watts, 292; *In the Matter of the District of Pittsburg*, 2 Watts & Serg. 320; *In Matter of Fenlon's Petition*, 7 Penn. 173; *Extension of Hancock Street*, 18 id. 26; *Sharpless v. City of Philadelphia*, 9 Harris, 147; *Shenly and Wife v. Allegheny City*, 25 Penn. 128; *Nichols v. Bridgeport*, 23 Conn. 189; *Griffin v. The Mayor*, 4 Coms. 419; *Commonwealth v. Alger*, 7 Cush. 53; *Cummings v. Police Jury*, 9 La. 503; *Moers v. City of Reading*, 21 Penn. 188; *Slack v. Maysville & Lex. R. R. Co.*, 13 B. Mon. 1; *Justices of Clarke Co. v. P. W. & R. R. Turnpike Co.*, 11 id. 143.

The taxing power being one of the sovereign powers vested in the general assembly by the people, and not being limited, either expressly or by clear implication, in the constitution, to the condition of making compensation, the judicial power possesses no authority to thus limit it.

The conclusion, therefore, is, that as the legislature may constitutionally exercise the right of eminent domain, which is limited by the constitution, in aid of the construction of railroads and other internal improvements of public utility, so, also, may it exercise the taxing power, which is *not* limited, in aid of the same objects.

It is objected that a railroad differs from other public highways, such as turnpikes and canals, because travelers cannot use it with their own carriages, and farmers cannot transport their own produce in their own vehicles. Chancellor WALWORTH, answering this objection, says: "*If the making of a railroad will enable the traveler to go from one place to another without the expense of a carriage and horses*, he derives a *greater benefit* from the improvement than if he was compelled to travel with his own conveyance over a *turnpike road at the same expense*. And if a mode of conveyance has been discovered by which a farmer can procure his produce to

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be transported to market at half the expense which it would cost him to carry it there with his own wagon and horses, there is no reason why the *public should not enjoy the benefit of the discovery.*"

"The *public* have an *interest in the use of the railroad*, and the owners may be prosecuted for damages sustained, if they refuse to transport an individual, or his property, without reasonable excuse, upon being paid the usual rate of fare." *Beekman v. The Saratoga & S. R. R. Co.*, 3 Paige, 45.

And in *Swan v. Williams*, 2 Mich. 427, the court says: "The fact that upon railroads individuals do not travel or transport property in their own vehicles, *furnishes no argument in this particular*, from the fact that the nature of the road, as well as the personal safety of individuals, renders it impossible that it should do so."

It is also said, that the last clause of the 9th section of the bill of rights, which declares that "no person shall be deprived of life, liberty, or property, without due process of law," is infringed by the act of 1870.

"Due process of law," means ordinary judicial proceedings in court. *Boyd v. Ellis*, 11 Iowa, 99; *Ex parte Grace*, 12 id. 214; *Taylor v. Potter*, 4 Hill, 140. So that if this clause of the constitution is held to apply to the taxing power, then no tax whatever for the support of the government can be legally levied and collected, except through a means of judicial proceedings in the courts; whereas, it is well known that the sovereign power of taxation belongs exclusively to the legislative department of the government, and that all taxes are levied and collected in pursuance of legislative enactments, without the aid of the courts. This clause has no reference whatever to the taxing power, and where property is taken in the lawful exercise of the taxing power, it is not taken "without due process of law." *Allen v. Armstrong*, 16 Iowa, 512; *McCarroll v. Weeks*, 2 Tenn. 215; *Harris v. Wood*, 6 B. Mon. 643; *Livingston v. Moore*, 7 Pet. 669.

It was said by Chief Justice DILLON, in *Hanson v. Vernon*, that this court, in the *Wapello County Case*, 13 Iowa, 388, had held, that "The legislature could not, under any circumstance, pass an act which will make it lawful for a county or city, in its corporate capacity, to subscribe stock in a railroad company," and that it was impossible "to hold the act of 1868 to be valid and yet stand by the decision" in that case.

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When it is remembered that until the passage of the act of 1868, the legislature of Iowa had never passed any act *purporting* to authorize any thing of the kind, and that no such question was before the court in the *Wapello County Case*, or in any other of the numerous cases involving the validity of city and county railroad bonds, it will be plain enough that whatever may have been said about the constitutionality of an act authorizing the issue of bonds by municipal corporations was only *dictum*. The real decision, in the case in 13 Iowa was, that the legislature had never authorized the municipal corporations of this state to subscribe stock to railroads, issue bonds, and levy and collect taxes to pay the same, and that those municipal corporations possessed no power independent of express legislative authority to subscribe to the stock of railroad companies, issue bonds therefor, and levy and collect local taxes to pay the same. To that decision and to the whole series of decisions of this court holding invalid county and city bonds, issued for that purpose, we give our unqualified approval. But it is given on the grounds that the general assembly had never passed any act conferring the power, and that without such legislation it did not exist,

This question of the constitutional power of the legislature to authorize municipal corporations to aid by local tax in the construction of railroads, within the territory of such municipal corporations, has been before the highest judicial tribunals of at least twenty-one of the states, and the supreme court of the United States, and in every instance the power has been confirmed, until quite recently in the supreme courts of Michigan and Wisconsin and in this court in the case of *Hanson v. Vernon*. See the following cases:

Sharpless v. The Mayor, etc., 21 Penn. St. 147; *Commonwealth v. Perkins*, 43 id. 410; *The People ex rel. v. Mitchell*, 35 N. Y. 550; *Clarke v. City of Rochester*, 28 id. 604; *Gould v. The Town of Venice*, 20 Barb. 442; *Slack v. City of Maysville*, 13 B. Mon. 1; *Maddox v. Graham*, 2 Metcalf (Ky.) 56; *Nicoll v. Mayor*, 9 Hum. (Tenn.) 252; *Goddin v. Cramp*, 8 Leigh, (Va.) 120; *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475; *Society for Savings v. New London*, 29 id. 174; *Cin. R. R. Co. v. Commissioners*, 12 Ohio St. 77; *State, etc. v. Commissioners*, 12 id. 596; *Shoemaker v. Goshen*, 14 id. 569; *Prettyman v. Supervisors*, 19 Ill. 406; *Butler v. Dunham*, 27 id. 474, and cases cited; *Gibbons v. Mobile, etc. R. Co.*, 36 Ala. 410; *Robinson v. Bidwell*, 32 Cal. 379; *The Com-*

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missioners v. Bright, 18 Ind. 93; *The City of Aurora v. West*, 22 id. 88; *Augusta Bank v. Augusta*, 49 Me. 407; *Clark v. Janesville*, 10 Wis. 130; *Ellis v. Glason*, 11 id. 470; *Caldwell v. Justices of Burke*, 4 Jones Eq. (N. C.) 223; *Powers v. The Inf. Ct. Dougherty Co.*, 23 Geo. 65; *The St. Joe & C. R. R. Co. v. Buchanan Co.*, 39 Mo. 485; *City of St. Louis v. Alexandria*, 23 id. 183; *Strickland v. Miss. R. R. Co.*, 27 Miss. 209-224; *Colton v. Comm. of Leon Co.*, 5 Fla. 610; *Police Jury v. Succession of McDonough*, 8 La. 341; *San Antonio v. Jones*, 28 Texas, 19; *Gilman v. Sheboygan*, 2 Black. 510, and cases cited.

We find, then, that upon principle and reason there is the same authority for the exercise of the sovereign power of taxation in aid of the construction of railroads that there is for the exercise of the right of eminent domain, and that this view is sustained by an overwhelming weight of authority. Our plain duty, therefore, is to sustain the act in question. And the question whether its enactment was dictated by a wise state policy or not, we must leave to the general assembly, where it exclusively belongs under the constitution.

Order refusing injunction affirmed.

BECK, J., dissenting.

NOTE.—The doctrine laid down in *Hanson v. Vernon* has, since the decision of that case, been sustained in the supreme court of Wisconsin, in *Whiting v. Sheboygan E. R.*, which arose upon a statute of the same character, for reasons similar to those of DILLON, J. It has also been upheld under like circumstances in the supreme court of Michigan in the case of *People ex rel. Detroit, etc., E. R. v. Township Board of Salem*. These cases have been fully reported in the law periodicals, but have not, as yet, appeared in the regular reports. — RSR.

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(27 Iowa 90.)

Executor—Debt due from him to estate.

In this country the liability of an executor for a debt due his testator is not discharged, but the debt is, in his hands, general assets of the estate for the benefit of creditors, legatees and other parties interested.

APPEAL from Des Moines district court.

This action was brought by plaintiff, who had, under a decision of the district court of Des Moines county, been appointed receiver

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of the property of the estate of John Pierson, Sr., deceased, to recover upon a claim held by said Pierson, at the time of his death, against the defendant, who was, by the last will of said Pierson, made executor. The trial below resulted in a verdict for the plaintiff, and a judgment against defendant personally, and not as executor, from which both parties appealed.

J. C. and B. J. Hall, for plaintiff.

Henry Strong, for defendant.

BECK, J. The point made by defendant, and which is presented by the record, is this: The defendant having been made executor of his creditor, he is released and discharged from the debt, it not appearing that the assets of the estate are insufficient to pay the testator's debts. This was an ancient rule of the common law, and is recognized by Blackstone. 2 Black. Com. 512. But authorities anterior to Blackstone, and some of them cotemporaneous with, if not anterior to, the authorities he cites in support of the doctrine, hold that a debt due from a testator's executor is general assets for the payment of the testator's legacies. *Phillips v. Phillips*, 2 Freem. 11; *Flud v. Rumcey*, Yelv. 15; *Hudson v. Hudson*, 1 Atk. 461; *Casey v. Goodinge*, 3 Brownl. 11; *Vesey*, 264; *Waukford v. Waukford*, 1 Salk. 306. While these authorities all admit that recovery cannot be had at law, for the reason the executor cannot sue himself, some of them hold that the debt may be enforced in the equity or in the spiritual courts. Others, that the executor will be held to have received the amount of the debt in money; or, in other words, to have paid to himself, as executor, the debt which he personally owed the testator; and, in case he does not administer the same, it is a *devastavit*. *Toller's Executors*, 347.

The rule appears arbitrary, unjust in its effects, and unsupported by reason, and ought certainly to be received with little favor by the courts of the present day. We have not been referred to a single modern case that supports it.

The authorities of this country hold the rule to be, that the liability of the executor is not released or discharged, but the debt is, in his hands, general assets of the estate for the benefit of creditors, legatees, and all other parties interested. *Stevens' Admr. v. Gaylord*, 11 Mass. 266; *Winship v. Bass et al.*, 12 id. 202; *Pusey v. Climson*,

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9 Serg. & Rawle, 208; *Leland v. Felton*, 1 Allen, 333; *Bichelberger v. Morris*, 6 Watts, 43; *Hall v. Pratt*, 5 Hammond, 44; *Gardner v. Hyer & Miller*, 19 Johns. 189; *Wood et ux. v. Tallman's Executor*, Coxe, 157.

The provisions of the Revision, §§ 2360, 2422, are not unlike the Massachusetts statute, as cited in *Winship v. Bass et al., supra*.

It would seem, indeed, under these statutory provisions, that the personal effects of every description of the testator are to be inventoried as assets for the payment of debts, legacies, and distribution to the heirs.

The plaintiff, upon his appeal, assigns for error the refusal of the court to render judgment against the defendant as executor, claiming the rule to be, that he is presumed in law to have received, in his capacity as executor, the amount of the debt which he owed the testator, and that he is liable therefor, as for a *devastavit*.

But we do not find that any exceptions were taken by the plaintiff to the ruling of the court below upon this question, and it cannot, therefore, be considered or determined by this court.

The judgment of the district court is

Affirmed.

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(37 Iowa 29.)

Contract—mutuality of. Subscription—notes in hands of trustees.

If A. promise to pay B. a sum of money to do a particular act, and B. does the act, A. is liable, though B. did not at the time of the promise engage to do the act; for, upon the performance of the condition by the promisee, the contract is clothed with a valid consideration, which relates back, and the promisee at once becomes obligatory.

Trustees holding notes, given by other parties for the benefit of a railroad corporation, cannot refuse to surrender such notes to the beneficiary, simply on the ground that a condition named in such notes, the failure to comply with which would render them void, had not been complied with.

APPEAL from Marion district court.

In April 1864, defendants undertook in writing, as a committee of the citizens of Pella, among other things "to obtain and secure

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subscriptions for said company in accordance with blank notes already presented by said company for that purpose, to an amount of at least ten thousand dollars," etc., "provided said company runs its track through Pella, as heretofore surveyed." About ten thousand dollars in subscriptions were obtained on promissory notes, payable when trains were running from Keokuk to Pella; each of said notes containing the condition that they were to be void if the trains were not running on or before October 1st, 1864.

The trains were not running until two and a half months after the stipulated time, but otherwise the contract was fulfilled.

This action was brought to compel a discovery and delivery to the plaintiff of the subscription, or notes, by the defendants, and in case of their failure to do so, to obtain judgment for the amount of deficiency of the subscriptions against defendants.

The petition was demurred to, principally on these grounds: 1. That the facts stated were not sufficient to entitle plaintiff to relief asked. 2. It appeared that plaintiff failed to comply with certain conditions precedent.

The demurrer was sustained, from which plaintiff appealed.

Henry Strong and Stone, Ayers & Curtis, for appellants.

SeEVERS & CUTTS, for appellees.

WRIGHT, J. My first impression was against this bill. Subsequent reflection, and a more careful examination of its averments and objects, have led me to believe that the demurrer was improperly sustained.

There need be no controversy as to many, and indeed most, of the positions assumed by appellees. Thus, it is conceded that the excuses set up for not completing the road by the time fixed are of no moment. Plaintiff *made its engagement*; failed to provide against bad weather or other contingency; and it was its own fault or folly that, by reason of these matters, it was unable to fulfill its contract. Having voluntarily assumed the obligation, the contract was binding; and neither accident nor necessity would excuse.

So, too, it is admitted that the contract would not be binding, if not supported by a sufficient consideration; nor should it be enforced, if wanting in mutuality. Nor do I controvert the proposition, that, as a rule, specific performance will not be decreed, if adequate com-

pensation can be made in damages for the breach of a contract of a personal character; or if the delivery of the thing, *in specie*, be really not important. And if this controversy was between plaintiff and the makers of the notes, and they should insist upon plaintiff's failure to comply with its contract as to the *time* of completing the road, I should feel constrained to hold against the right to recover. This was substantially held in *B. & M. R. R. Co. v. Boestler*, 15 Iowa, 555, and *Thompson v. Oliver*, 18 id. 417.

But I do not believe that, as to this question, appellees occupy the position of the subscribers; of which, however, more hereafter. Then, as to the want of mutuality and a consideration: it is plain law that, if A. promise to pay B. a sum of money if he will do a particular act, and B. does the act, A. is liable, though B. did not, at the time of the promise, engage to do the act; for, upon the performance of the condition by the promisee, the contract is clothed with a valid consideration, which relates back, and the promise at once becomes obligatory. *Goodpaster v. Porter*, 11 Iowa, 161, and cases there cited. Plaintiff alleges performance on its part; and thus is a consideration shown, and the objection of a want of mutuality removed. The rule as to specific performance has no place; for plaintiff seeks to charge defendants as trustees, as parties occupying a trust relation, having funds or property in their hands, for which they refuse to account. If they have these subscription notes, plaintiff is entitled to them — could, by bill in equity, compel their surrender, even though defendants might, at law, be liable in damages for a breach of their agreement to procure and deliver. In such a case, plaintiff might elect to recover the specified notes, or their value, by an action at law upon the contract. The solvency or insolvency of defendants is of no moment, under such circumstances. Plaintiff would have a right to insist upon the execution of the trust. For, in equity, the notes would belong to the company, and defendants could not, by a violation of their trust duty, defeat the recovery of the specific articles. It would make no difference that the money might answer as well as the notes. Defendants would be in no position to insist upon this. It is the will, the election of the beneficiary, and not of the delinquent trustee, that is to be consulted in such cases.

The real and difficult point in the case, however, is, whether plaintiff shows itself entitled to these notes, as against these defendants. The argument against the right, if there be any, is found in

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the fact that the road was not completed by the 1st of October, and no sufficient excuse for the failure is shown.

But it must be remembered that *defendants'* contract contains no condition as to the completion of the road, at least as to time. The only proviso is, that the track *shall be run through Pella*. There is no condition that these notes are *not to be delivered* if there is a failure to run trains by the 1st of October, or any other time. The condition is *in the notes*, but not in *defendants'* obligation. They must stand by *their* contract, and not upon that of others.

Not only so, but, as I have already suggested, *defendants* are trustees — trustees holding property in which plaintiff is beneficially interested. The charge is, that these subscription notes were made and are now in *defendants'* hands. It is their duty, in my judgment, to surrender them. There is no suggestion that the makers have interposed any objection to paying these notes, and *non constat* that they ever will. It may be that, feeling themselves largely benefited by the completion of the road — though not by the *day named* — they will waive the breach. It may be that they will pay rather than become involved in litigation. Or, possibly, there may be facts estopping the subscribers from insisting upon the failure of the company to have the trains running by the time named. But, in any event, *as the notes were made and placed in defendant's hands, and are still there*, their plain duty is to surrender the same. If they *had never received them*, and plaintiffs were seeking to recover damages for a breach of the agreement, a different question might arise. The notes, when made, were for the benefit of the company — *defendants* were mere agents or trustees to hold the same; and it is not for them to refuse to discharge their duty, because, perhaps, the makers have defenses which they will, or will not, interpose. Suppose, instead of having the notes, they had, at the time of receiving subscriptions, obtained money, or, since that time, had been paid money on the notes, could they be heard to say, "the road was not completed by the time named, and we will therefore keep what we have?" It seems to me clearly not. In view of their relation to plaintiff, and the terms of their undertaking — assuming the facts to be as stated in the petition — *defendants* cannot be allowed to stand in the place of the subscribers, and, in their name, interpose a defense or defenses which I cannot but believe to be purely personal.

If *defendants* had obtained deeds, in the name of the company

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for the *right of way, depot grounds, or cattle yards*, as contemplated by their agreement, and as clearly provided for as their obligation to secure the subscriptions, could they withhold the same, if demanded by plaintiff, upon the ground that the road was not completed by the time named? It is certainly not so "nominated in the bond;" nor, upon any *equitable principle*, should they, as trustees, be allowed to deny the superior rights of the beneficiary, by withholding such title papers. And the same must be true as to the *subscription notes*.

As the record stands, therefore, I think plaintiff is entitled to a discovery of the subscription made, and to a surrender thereof, or any money received thereon. This is the vital question in the case, and beyond this I need not go at present.

I think the judgment should be reversed. And all of the judges being of this opinion, it is so ordered.

Reversed.

BATES, appellant, v. BATES *et al.*

(27 Iowa, 110.)

Will, declarations of testator, when admissible.

Declarations of a testator, tending to show that his mind and faculties were impaired, and that a will was procured by undue influence, are admissible to impeach the validity of the will.

APPEAL from Story district court.

This action arose upon the will of Joseph Bates, Sr., who died leaving a wife and three small children, also four children by a former wife, and grandchildren, children of deceased children by said former wife. His whole property in value about \$15,000, was left to his wife, the plaintiff, and her children, except trifling legacies, varying from one dollar to one hundred dollars, to his other children and his grandchildren. When the will was presented to the county court for probate, the children of the former wife contested it, on grounds of insanity and undue influence. It was, however, admitted.

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An appeal was taken to the district court, where upon a trial before a jury, the will was adjudged invalid, from which plaintiff appeals.

Boardman & Brown, for appellant.

John Porter and *Withrow & Wright*, for appellees.

[Only so much of the opinion is given as is of general interest. The remainder relates principally to practice and an examination of facts].

COLE, J. During the progress of the trial several witnesses, introduced by the contestants, testified, against the objections of the plaintiff, to conversations had by them with the testator, both before and after the execution of the will, to the effect that he was obliged to make the will in order to have peace in his family, and that the will was not his own, but was made to suit his wife, etc., etc. It is now claimed that it was error to admit the evidence of the declarations of the testator to invalidate the will made in writing, in due form, and properly attested.

The authorities upon this question are not in harmony. Indeed, the conflict is apparently irreconcilable. The question was thoroughly examined and discussed, and the authorities critically reviewed, by Mr. Justice SELDEN, in the case of *Waterman v. Whitney*, in the court of appeals of New York. See 11 N. Y. (1 Kern.) 157. It is there *held*, that the declarations of a testator are not competent evidence to show a revocation of a will admitted to have been once valid, nor to impeach the validity of a will for duress, or on account of some fraud or imposition practiced upon the testator, or for some other cause not involving his mental condition. But such declarations of the testator, whether made before or after the making of the will, are competent evidence *to show the mental incapacity of the testator, or that the will was procured by undue influence*. We are content to follow this case so far as it is applicable to the point now under consideration. Nor do we deem it necessary to here review the authorities. Under the rule, as laid down in that case and here followed, there was no error in admitting the testimony complained of. It was claimed, and evidence was given tending to show, that the testator's mind and faculties were impaired by

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reason of his advanced age, and a material issue was as to the undue influence of the plaintiff over the testator in the making of the will; and upon this question there was other important and substantive testimony besides the declarations proved. These declarations were competent to be received and considered, in connection with the substantive facts tending to establish the same issue, also shown in evidence in the case.

Affirmed.

MILLER, appellant, v. PHOENIX INSURANCE COMPANY.

(37 Iowa, 202.)

Insurance — authority of agents.

Local agents of foreign insurance companies, appointed by a general agent located without the state, are to be considered general agents, and corporations represented by them are bound by their acts which are within the scope of the general authority they possess, though in violation of limitation upon that authority not brought home to knowledge of party dealing with them.

APPEAL from Cedar district court.

One Fassett being insured by the defendant against loss by fire, to the amount of \$6,000, and having sustained a considerable loss, while the claim thereupon was yet unadjusted made a draft upon the defendant for \$1,263.38, payable to the order of the plaintiff, to whom Fassett was indebted. The draft was accepted before adjustment, by the local agent of the defendant, but was not paid. This action was brought upon the draft. Defendant claimed in his answer that the local agent had no authority to accept the order, and that the acceptance was made without its knowledge or consent, and with a fraudulent intent as to its rights. Other facts appear in the opinion. Judgment below for defendant, from which plaintiff appeals.

Wolf & Landt and H. O'Conner, for appellant.

Cook & Drury, for appellee.

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BECK, J. The errors assigned upon the record relate to the exclusion of certain evidence offered by plaintiffs. The question arising thereon need only be considered.

The plaintiffs introduced, as a witness, Wells Spicer, who testified that he was, during the time of the transactions set out in the petition, the local or resident agent of defendant, at Tipton, where the insurance was effected, and, as such agent, issued the policy. His commission, as agent, was introduced in evidence. It empowers him "to receive proposals for insurance against loss or damage by fire, and to make insurance by policies of the said Phoenix Insurance Company, to be countersigned by the said Wells Spicer, Esq., agent, and to renew the same; to assent to assignment or transfers, and to do all matters and things pertaining to said appointment that shall be given him in charge by said company, or its general agent, at Cincinnati, O."

The plaintiffs offered to introduce in evidence certain printed circulars, issued by the defendant for the purposes of advertisements.

One of them purported to be signed by "Wells Spicer, Tipton, Iowa, resident agent," and, as one of the inducements for the public to do business with him, stated that losses under policies issued at his agency would be paid through him.

The other circular has the name of no agent, the blank therefor not being filled, and states that "losses will be paid at this agency in bankable funds."

The plaintiffs propose to prove that these circulars were received from defendant. Plaintiffs also offered in evidence a letter from the general agent of defendant, at Cincinnati, Ohio, to Wells Spicer, the local agent, acknowledging the receipt of the order sued on, but returning it, according to Spicer's request. This letter states that defendant had been garnished by certain creditors of Fassett; that such garnishments must be legally removed before defendant can take any action in the premises, and, as soon as they are removed, "it will" (in the language of the letter) "give us pleasure to deal directly with Mr. Fassett," etc. The letter proceeds as follows: "Welch & Shipman, attorneys, sued the Phoenix and enjoined us, or, rather, they brought joint suit against Fassett and the Phoenix. If you can satisfy them that their client's claim will be protected through you, they will doubtless release us and enable us to act and deal directly with Fassett in the matter of the loss and adjustment, but the garnishees must be released." This letter

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was dated August 18, 1865. No objection is made in this letter to the act of Spicer in accepting the order.

Plaintiffs offered in evidence another letter of the general agent of the company to Spicer, dated December 28, 1865, directing him to settle with Fassett by payment to him of \$4,500, and no more. This letter covered a blank draft, to be signed by the agent Spicer, upon the general agent, and an original duplicate and triplicate receipt, to be signed by Fassett upon payment to him of the sum aforesaid.

No allusion is made in this letter to the order accepted by Spicer. The court refused to admit in evidence the aforesaid circulars and letters, and the facts above stated in connection therewith, "unless," in the language of the record, "the plaintiffs would show the authority of said Spicer to accept the said order."

The ruling of the court thus excluding the evidence is erroneous.

This court has held, following a strong current of authorities, that agents of insurance companies, empowered as the agent of defendant, are to be considered general agents, and corporations represented by them are bound by their acts which are within the scope of the general authority they possess, though in violation of limitation upon that authority not brought home to the knowledge of the party dealing with them. *Viele v. Germania Insurance Co.*, 26 Iowa, 9; *Keenan v. Mo. St. Mut. Insurance Co.*, 12 id. 126.

Whether the payment of losses by acceptance of bills or orders is within the scope of the authority of a general agent, we need not now consider. If not, it was competent for defendant to confer that power by special appointment or instructions, and it doubtless could so act as to induce the public to believe that such power had been conferred.

Under such circumstances, it would be estopped to deny that such power was possessed by its agents; and the defendant could so act, after the exercise of such power by the agent, as to adopt and ratify his acts, and thus preclude itself from denying them. The circulars, letters, and other evidence excluded, seem to us pertinent evidence in this view of the case, and proper to be admitted and considered in determining the question of the agent's power to accept the order, and thus bind defendant.

Reversed.

McMartin v. Bingham.

McMARTIN v. BINGHAM, appellant.

(37 Iowa, 284.)

Reference without consent—long account.

Courts of equity have a general jurisdiction where there are mutual accounts, and also where the accounts are on one side, but a discovery is sought, and is material to the relief. But where the accounts are all on the one side, and mere set-offs on the other, and no discovery is sought or required, courts of equity have not jurisdiction.

Fourteen items, under eight different dates, and two credits, the account being all on one side and no discovery sought, and the defenses being denial, payment and the statute of limitation, will not deprive the parties of a right to a jury trial.

APPEAL from Black Hawk district court.

Action upon an account for legal services. A copy of the account annexed to the petition, contained fourteen items under eight different dates, from October, 1856, to May, 1866, aggregating \$8,497.50, and one credit of \$475. A further credit of \$25 was admitted in the reply.

The answer denied a part of the petition, also set up payment and the statute of limitation, to which answer plaintiff replied.

At a jury trial, in May, 1868, a verdict was rendered for plaintiff, for \$870.09, which was set aside for misconduct of the jury. In October, 1868, an order was made, that "This cause coming on for hearing, and the court being satisfied *from an examination of the pleadings*, that this is an action requiring an examination of accounts between the parties, and the parties not consenting to a reference, it is ordered by the court that the same be referred to a referee, to which order defendant excepts." From this order defendant appeals.

Boies & Allen, for appellant.

E. W. Eastman, for appellee.

COLB, J. The only question made in this case is one as to the power of the court to direct a reference of a cause when the parties do not consent thereto. Our code, so far as it bears upon this

question, authorizes such reference, "*when the trial of an issue of fact shall require the examination of mutual accounts, or when the account, being on one side only, it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness, to prove the account,* in which case the referees may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein." Rev. § 3090, subdivision 1. The New York code is the same as ours, except that, in lieu of the words italicised above, it has "a long account on either side." Howard's N. Y. Code, § 271. The Ohio code authorizes such a reference "in any case in which the parties are not entitled by the constitution of this state to a trial by jury." Seemy's Ohio Code, § 282.

Our constitution provides, that "the right of trial by jury shall remain inviolate." Art. 1, § 9. It is probable that our code, though more specific than the Ohio code, did not intend to do more than authorize a compulsory reference when the parties were not entitled by the constitution to a trial by jury; certainly any provision beyond that would be nugatory. Courts of equity have a general jurisdiction where there are mutual accounts, and also where the accounts are on one side, but a discovery is sought and is material to the relief. But where the accounts are all on one side, or where there is a single matter on the one side, and mere set-offs on the other, and no discovery is sought or required, courts of equity have not jurisdiction. See Story's Eq. Jur. §§ 457 to 459. Our code has specified the precise matter which was formerly of equitable cognizance, and as to which, of course, in that court there was no right of trial by jury. In order, therefore, to ascertain the precise extent of the power of reference given by our code, we must look to the jurisdiction of courts of equity in matters of account.

The question for our decision, then, is simply this: Is this case such as was formerly cognizable in courts of equity? And this question we are constrained to answer in the negative. And we do this, not only upon the general rule of equitable jurisdiction, as above stated, but also upon the specific language of eminent jurists, pertinent and necessary to the decision of the cases before them.

It was said by Chancellor KENT, in *Porter v. Spencer*, 2 Johns. ch. 171, "to sustain a bill for an account there must be mutual demands, and not merely payments by way of set-off." And by Lord LANGDALE, in *Darthey v. Clemens*, 6 Beavan, 165, 169, "if the

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account can be fairly taken in a court of common law, this court will not interfere;" and by Chief Justice MARSHALL, in *Fowle v. Lawrason*, 5 Peters, 495, "that a court of chancery has jurisdiction in matters of account cannot be questioned; nor can it be doubted that this jurisdiction is often beneficially exercised; but it cannot be admitted that a court of equity may take cognizance of every action for goods, wares and merchandise sold and delivered, or of money advanced, when partial payments have been made, or of every contract, express or implied, consisting of various items on which sums of money have become due and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a court of chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction."

Indeed, the supreme court of Ohio, in the case of *Johnson v. Wallace*, 7 Ohio, 392, even went so far as to hold that, where the plaintiff's bill of particulars contained one hundred and seventy-five distinct items, and the defendant's contained upwards of two hundred, that the court had no power to direct a reference; and this, upon the ground that, under the constitution and laws of Ohio, the party had the right to submit his cause to a jury for trial.

Where a case falls within the rules of equitable cognizance, as correctly specified by the code, there should be no hesitation in the exercise of the power of compulsory reference. But the right of trial by jury is not only an important right, but it is a right sacredly guaranteed by our constitution, and should not be tampered with by the legislature or encroached upon by the courts. We are not unmindful of the fact that the great press of business in some of our district courts, and the disproportionate length of time, as compared to the little ultimate importance of the case, which it often takes to try cases brought upon an account, seem almost inexorably to demand their reference, and the economizing of judicial time thereby. But it is better to suffer the inconvenience and delay resulting from a

jury trial of such causes, than to narrow in the least, by judicial construction, the invaluable right of trial by jury.

Under the New York code, which is broader than ours, the courts have wisely shown a disposition to limit compulsory references to cases clearly within the language of the provision. It has been there held, that an action upon one bill of fifty items was not referable (*Swift v. Wells*, 2 How. Pr. 79); so with a bill of seven items, of two different dates (*Smith v. Brown*, 3 id. 9); so in a case upon one bill of lading of eleven different items (*Miller v. Hooker*, 2 id. 171); a bill of particulars is not an account, in the meaning of the code authorizing a reference when the examination of a "long account" is involved. *Dickinson v. Mitchell*, 19 Abb. Pr. 286. See, also, and especially, *Sharp v. Mayor, etc.*, 18 How. 213; and *Cameron v. Freeman*, id. 310.

In this case there are fourteen items under eight different dates, and two credits. The account is all on one side, and no discovery sought. The defenses are denial, payment, and the statute of limitations. This would not afford a basis for an action of account at the common law, nor for a bill in equity under the former chancery practice. The defendant has a right to a jury trial, of which he cannot be deprived without his consent.

Reversed.

WILLIAMS, appellant, v. HAYNES.

(27 Iowa, 261.)

Conflict of law — Consideration of sealed instrument.

Under the statute of Iowa the want of consideration in a sealed instrument may be inquired into, and this does not except instruments made in other states.

This statute affects all sealed contracts made after its passage. It relates to the remedy, and does not impair the obligation of the contract, within the meaning of the adjudications of the United States supreme court.

APPEAL from Jones district court.

This action was brought by the payee of a promissory note made in Maryland, against the maker. The note was executed with a "scroll," which plaintiff claimed was, under the laws of Maryland,

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equivalent to a seal. The defendant, among other things, plead a want of consideration, to which plea plaintiff demurred, claiming that the consideration of a sealed instrument could not be inquired into under the common law, which, at the time the note was made, prevailed in Maryland. The demurrer was overruled, and plaintiff appeals.

G. W. Field, for appellant.

C. R. Scott, for appellee.

DILLON, C. J. Respecting contracts under seal, the common law, except in certain special cases, conclusively presumes a consideration. It will be taken as true that the instrument in suit is a sealed instrument, and that the common law as to sealed instruments prevails in the state of Maryland, in which the note was executed, and where the parties thereto resided at the time. Under the averments of the petition, the defense of want of consideration would not have been a good plea had the plaintiff brought suit against the defendant in the state of Maryland. Such is the basis of the plaintiff's premises, and its correctness will not be controverted by us. But the plaintiff has brought his action in the courts of Iowa, and must be content with such remedies as the laws of this state give him. By statute (Rev. ch. 76), the important distinction which the common law made between simple contracts and those under seal is abolished. In this country that distinction had ceased to have any philosophy or reason to support it. Hence, the legislature enacted, that "the addition of a private seal to an instrument of writing should not affect its character in any respect," and that "the want or failure, in whole or in part, of the consideration of a written contract, may be shown as a defense," etc.

Under this statute, want of consideration is inquirable into and is a good defense. The statute is broad, and does not except the cases of instruments executed in other states. It professes to apply to all instruments made after its passage, and it does apply to all such, whether made in this state or elsewhere, if they are sought to be enforced here.

This statute was in force at and before the time the note in suit was executed. As to the right of the legislature to change the common law rule, no question can be made. The wisdom of the change

in this particular is apparent. Certain it is, that the legislature has declared in terms that the defense set up is available to the defendant. The plaintiff must take such remedy as our laws afford him. He has not a vested right in the courts of other states to all the common-law incidents of contracts, provided the *obligation* of the contract be not impaired.

Respecting what shall be good defenses to actions in this state, its courts must administer its own laws, and not those of other states. The common-law rules do not so inhere in the contract as to have the portable quality ascribed to them by the plaintiff's counsel, much less can they operate to override the plain declaration of the legislative will.

Our act of the legislature, allowing the defense of want of consideration to be pleaded to all actions on subsequent sealed contracts, is a matter relating to the remedy, and does not impair the *obligation* of the contract, within the meaning of the authoritative adjudications of the supreme court of the United States. *Sturgis v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 11 id. 213. See *Hawley v. Hunt*, *ante*, 183, and cases cited.

Cases standing upon the same principle as the one before us, have been frequently decided. *United States v. Donnelly*, 8 Pet. (U. S). 861, 373; *Warren v. Lynch*, 5 Johns. 239; *Andrews v. Harriot*, 4 Cow. 508; *Thrasher v. Everhart*, 3 Gill. & Johns. 234; *Douglas v. Oldham*, 6 N. H. 150.

Affirmed.

STATE, appellant, v. DOWE.

(27 Iowa, 273.)

Criminal law—false pretences.

A false promise will not sustain a charge of crime or false pretense. It must be a representation in fact that is false, and this must be relied on by the party defrauded. But if a pretense and promise blend together, and jointly act upon the defrauded person, whereby he is induced to give faith to the pretense, the case is within the statute.

When D. pretended to H. that he had come to pay a debt due H., whereby H. was induced to make and deliver to D. a receipt, which D. immediately took and carried away without payment or consent of H.,—*Held*, within the statute.

APPEAL from Dubuque district court.

Indictment for false pretences, to which defendant demurred.
Demurrer sustained, from which the state appeals.

Henry O' Connor, attorney-general, for state.

No appearance for appellee.

BECK, J. The indictment charges the crime in the following words: "The said C. E. Dowe heretofore, etc., at, etc., designedly and by false pretense, and with intent to defraud one Nicholas Hunsen, did, etc., designedly and falsely pretend to said Hunsen that he, the said Dowe, had come to pay the said Hunsen twenty dollars, a debt due the said Hunsen from the said Dowe, and the said Hunsen, believing the said false pretenses and representations so made, as aforesaid, etc., and being deceived thereby, was induced, by reason of the false pretenses and representations so made, to sign a receipt for the payment of the said sum of twenty dollars, which said receipt was of the tenor following:" (giving copy of receipt) "which said receipt the said Dowe took into his possession and carried away, without the consent of said Hunsen, and did not pay said Hunsen the twenty dollars, or any other sum." The indictment further alleged, that defendant "had not come to pay said Hunsen twenty dollars, or any other sum."

The statute under which the indictment is presented is as follows: "If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods or other property, or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery, he shall be punished," etc. Rev. §§ 43, 94.

The false making of the receipt would be an indictable offense, and is classed as forgery by the state. Rev. ch. 168. The demurrer to the indictment, however, raises no such question. The objection presented by the demurrer is, that the pretense set forth in the indictment was not of a nature to deceive or defraud, under the statute, and was a false promise and not a misrepresentation. This seems to have been the view taken by the court below. It is true that a false promise will not sustain the charge of crime for which punishment is provided in the statute above quoted. It must be a pretense, a representation in fact, that is false, and this must be relied upon by the party who, it is charged, was defrauded; upon this point no objection is made to the indictment. But the fact that a promise is combined with the false pretense does not take away the criminal character of the act. If the pretense and promise blend together, and jointly act upon the defrauded person, whereby he is induced to give faith to the pretense, the case is within the statute. 2 Bishop's Crim. Law, §§ 348, 352. In the case before us, the pretense was the act of coming, and the averment that defendant had come, to pay the money. These, doubtless, implied a promise to pay, otherwise they could not have operated upon the mind of the party defrauded to induce him to make and sign the receipt. The act of the defendant in coming to the other party, proclaiming his intention and purpose to pay the money, is readily distinguishable from a promise so to do. A pretense may be gathered from the acts and conduct of a party. 2 Bishop's Crim. Law, § 355; see *The Commonwealth v. Drew*, 19 Pick. 179. And it was the acts and conduct of the party, as charged in the indictment, that constituted the pretense. Their fraudulent and false character, and that the defrauded party was deceived thereby, and other ingredients of the crime, are sufficiently averred. In our opinion the demurrer should have been overruled.

Reversed.

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(27 Iowa, 308.)

State insolvent laws, invalid against non-resident creditors.

A non-resident and non-assenting creditor is not bound by the debtor's discharge under state insolvent laws, no matter where the debt originated or was made payable. The citizenship of the parties governs, and not the place where the contract was made or was to be performed.

The discharge of the defendant, under the insolvent laws of New York, will not bar a suit upon judgments recovered against him in the state of New York, and, previous to his application for discharge, assigned to a citizen of Iowa.

APPEAL from Jackson district court.

This action arose upon two judgments rendered against defendant in the supreme court of New York, in 1854, of which state defendant was at that time a citizen and resident. In 1856 defendant removed to Iowa, where he remained with the exception of about nine months in 1862, 1863, and was, at the time of the commencement of this action, a resident of that state.

In 1860 one of the said judgments was assigned to plaintiff, and in 1861 the other judgment was likewise assigned to him. The plaintiff at such times, and at the commencement of this action, was a resident and citizen of Iowa. In 1862 this action was commenced. Defendant appeared, admitted the judgments, and pleaded payment, etc.

In 1863 the defendant, claiming to be a citizen and resident of New York, obtained a discharge under the insolvent laws of that state, the certificate of which was dated August 3d of that year. This action having kept along, the defendant, in March, 1865, filed an amended answer, in which the discharge was pleaded.

At the trial, defendant introduced evidence tending to show, that at the time of procuring his discharge he was a citizen and resident of New York, and plaintiff introduced some evidence in contradiction of this claim of defendant. The cause was tried by the court and judgment given for the defendant, from which plaintiff appealed. On account of defective record, the judgment was

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affirmed, but the record having been perfected, the affirmance was set aside, and the cause is now argued upon its merits.

C. M. Dunbar, for appellant.

W. E. Leffingwell, for appellee.

DILLON, C. J. Respecting the validity of discharges under state insolvent laws, where the creditor is a non-resident of the state granting the discharge, there has been much discussion, much conflict of opinion, and, until recently, much doubt. But, in view of the authoritative adjudications of the supreme court of the United States, presently to be referred to, and of the leading decisions of the state courts, cited below, the law, so far as relates to the present case, may be stated in a single sentence.

The settled doctrine now is, that a debt attends the person of the creditor, no matter in what state the debt originated or is made payable; that a creditor cannot be compelled by a state, of which he is not a citizen or resident, to become a party to insolvent proceedings therein; that such proceedings are judicial in their nature, so that jurisdiction over the person of the creditor is essential; that notice is requisite to jurisdiction in such cases, and can no more be given in insolvent proceedings than in personal actions, where the party to be notified resides out of the state; and, hence, a discharge under a state insolvent law will not and cannot discharge a debt due to a citizen of another state, unless the latter appears and voluntarily submits to the jurisdiction of the court, by becoming a party to the proceeding, or claiming a dividend thereunder.

As direct authority for this statement of the law, we refer to the following decisions of the supreme court of the United States: *Baldwin v. Hale*, 1 Wall. 223, 183; S. C., 3 Am. Law Reg. (N. S.) 462, and note by Judge REDFIELD; *Ogden v. Saunders*, 12 Wheat. 213; *Byle v. Zacharie*, 6 Pet. 348; *Cook v. Moffatt*, 5 How. 310; *Suydam et al. v. Broadnax et al.*, 14 Pet. 75.

See, also, the following cases and authorities: *Donnelly v. Corbett*, 7 N. Y. (3 Seld.) 500; *Felch v. Bugbee*, 48 Maine, 9; S. C., 9 Am. Law Reg. (O. S.) 104; *Beers v. Rhea*, 5 Texas, 349; *Poe v. Duck*, 5 Md. 1; *Anderson v. Wheeler*, 25 Conn. 603; *Crows v. Coons*, 27 Mo. 512; *Pugh v. Bussel*, 2 Blackf. 394; *Beer v. Hooper*, 32 Miss. 246; *Woodhull v. Wagner*, Baldw. C. C. 300; *Byrd v. Budger*,

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McAll. C. C. 263; *Springer v. Foster*, 2 Story C. C. 387; 2 Story on Const. § 1390; Conf. Laws, § 341; 2 Kent Com. (9th ed.) 503; *Kelly v. Drury*, 9 Allen (Mass.) 27, 1864.

I have said that the settled law now is, that a non-resident and non-assenting creditor is not bound by the debtor's discharge under state insolvent laws, no matter where the debt originated or was made payable. In other words, the *citizenship* of the parties governs, and not the *place* where the contract was made, or where it is to be performed.

It is, perhaps, desirable to trace briefly the line of decision leading to and establishing the doctrine as above stated.

Respecting state insolvent laws, the controlling constitutional provision is, that "no state shall pass any law impairing the obligation of contracts." "Any law," to use the language of Mr. Webster, in his argument in *Ogden v. Saunders* (6 Webs. Works, 26), "impairs the obligation of a contract *which discharges the obligation without fulfilling it.*"

In *Sturges v. Crowninshield*, 4 Wheat. 122, the supreme court of the United States held such laws to be invalid as to pre-existing contracts. Subsequently, the great case of *Ogden v. Saunders*, 12 id. 213, came before the court. Respecting just what that case decided, there has been much real difference of opinion; but these differences have been set at rest by the recent decision in *Baldwin v. Hale*, before cited.

In *Ogden v. Saunders*, one point ruled or declared was, that a state insolvent or bankrupt law was not a law impairing the obligation of contracts as respects debts contracted *after* the enactment of such law. This was upon the ground, largely if not wholly, that every contract made in a state must be taken to have relation to the existing law of the state, which becomes, so to speak, part of it, attached to it and attendant upon it; and since the insolvent law declares a right on the part of the debtor to be discharged from contracts thereafter made on certain terms, whoever becomes interested in such contracts takes them subject to this right, and the exercise of such right cannot be said to impair the obligation of the contract. It was this point in the case which has been the cause of much controversy in the state courts. In his argument, Mr. Webster combated with great force the proposition "that the law itself was a part of the contract, and, therefore, cannot impair it." 6th vol. Webs. Works, 29.

At present, however, we have no occasion to enter upon a discussion of this vexed proposition; the supreme court asserted that a state bankrupt law was not invalid as respects *subsequent* contracts, and the point ruled in *Ogden v. Saunders* was, that a state insolvent law cannot affect the rights of creditors who are citizens of other states.

The second opinion of Mr. Justice JOHNSON (12 Wheat. 258), says Judge CURTIS, was concurred in on the general question, and settled the law involved therein. On this point, see also, *Boyle v. Zacharie*, 6 Pet. 348, 643; *Cook v. Moffatt*, 5 How. 310; *Baldwin v. Hale*, *supra*, per CLIFFORD, J.

The principle of the decision in *Ogden v. Saunders*, as stated by Mr. Justice JOHNSON, is, "that, as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid, as it affects posterior contracts; as against citizens of other states, it is invalid as to all contracts."

In *Cook v. Moffatt*, 5 How. 309, the leading case of *Ogden v. Saunders* was reviewed, the soundness of many of the reasons assigned in former opinions questioned, but the court held, among other points, that "a certificate of discharge, under an insolvent law, will not bar an action brought by a citizen of another state on a contract made with him;" that state insolvent laws "can have no effect on contracts made before their enactment, or beyond their territory."

This language, it will be seen, is not free from uncertainty, and does not necessarily exclude the notion, that if a contract is made originally between citizens of a state, and *is to be performed there*, and a non-resident subsequently becomes interested in or the owner of such contract (for example, a bill of exchange), he shall not be bound by a discharge granted in pursuance of a state law, in existence at the time when the contract was made. The supreme court of Massachusetts, admitting its duty to follow what was *decided* on this subject by the supreme court of the United States, held that, even as between citizens of different states, a state insolvent discharge was effectual *in cases where it appears, by the terms of the contract, that it was made and to be performed in the state granting the discharge*. This was in *Scribner v. Fisher*, 2 Jay, 43, Mr. Justice METCALF dissenting.

This decision was followed in other cases in that state, which, without re-argument, were rested upon it.

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In *Demeritt v. Exchange Bank*, 10 Law Rep. 606 (March, 1858), Mr. Justice CURTIS, then of the supreme court of the United States, in express terms denied the correctness of *Scribner v. Fisher*, stating, that it was in conflict with *Ogden v. Saunders*, and *Boyle v. Zacharie*. "It is urged," says Judge CURTIS, "that where the contract is to be performed in the state, it is not within *Ogden v. Saunders*. It has been so held in *Scribner v. Fisher*, 2 Gray, 43. But I cannot concur in that opinion. I consider the settled rule to be, that a state law cannot discharge or suspend the obligation of a contract, though made and to be performed within the state, when it is a contract with a citizen of another state."

In *Donnelly v. Corbett*, 7 N. Y. (3 Seld.) 500, 1852 the court of appeals of New York; in *Felch v. Bugbee*, 48 Me. 9; S. C., 9 Am. Law Reg. (O. S.) 104, 1860, the supreme judicial court of Maine; in *Anderson v. Wheeler*, 25 Conn. 607, the supreme court of Connecticut; and in *Doe v. Puck*, 5 Md. 1, the supreme court of Maryland,—and there are other similar decisions,—decided that the distinction taken in *Scribner v. Fisher* was unsound, and that state insolvent laws had no extraterritorial effect, so as to operate upon the rights of citizens of other states.

But in *Baldwin v. Hale*, before cited, the supreme court of the United States, in 1863, in terms, and by name, declared *Scribner v. Fisher* to be in conflict with the settled rule of that court. Mr. Justice CLIFFORD, after reviewing the prior decisions, and stating the points ruled, says: "But a majority of the court held, in *Scribner v. Fisher*, that, if the contract was to be performed in the state where the discharge was obtained, it was a good defense to an action on the contract, although the plaintiff was a citizen of another state, and had not, in any manner, become a party to the proceedings. Irrespective of authority, it would be difficult, if not impossible, to sanction that doctrine. Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard; and, in order to be heard, they first must be notified. Common justice requires that no man shall be condemned without notice, and an opportunity to make his defense. Courts of one state have no power to require citizens of other states to become parties to insolvent proceedings. * * * Insolvent laws of one state, cannot discharge the contracts of citizens of other states, because, they have no extraterritorial operation, and, consequently, the tribunal

sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and, consequently, there can be no obligation to appear, and, of course, there can be no legal default."

Independent of its authoritative force, this decision, and the grounds upon which it is placed, command unqualified approval.

Certain it is, that it is the final and settled doctrine of the supreme court of the United States, with respect to a question of which that tribunal is the ultimate arbiter.

Subsequently, the supreme court of Massachusetts, in *Kelly v. Drury*, 9 Allen, 27, following the decision in *Baldwin v. Hale*, itself overruled *Scribner v. Fisher*.

The supreme court of the United States having thus settled that a citizen of another state cannot be affected by an insolvent discharge in the state in which the debtor resides, even though the contract was made, and, on its face, is to be performed, therein, that principle settles this case, and shows that the judgment of the district court was erroneous, on the undisputed facts before it.

Those facts were, that the judgments sued on were rendered against the defendant in New York; that he afterward removed to and became a citizen of Iowa; that plaintiff was likewise a citizen of Iowa; that both plaintiff and defendant were citizens of this state at the time when the judgments were assigned to the plaintiff, at the time the latter brought suit, and at the time the judgment was recovered which is now appealed from.

The discharge was no bar to the plaintiff's action, even though it be admitted that the defendant concluded to remain in New York, and in good faith applied for his discharge as a citizen of that state.

The assignment of the judgments to the plaintiff made him the owner of them, and of the debt of which they were the record evidence. He was as much the owner as if they had been recovered in his name. Our statute recognizes the plaintiff as the owner, and allows him to sue thereon in his own name. The defendant had notice of the assignment. He owed the debt, and owed it to the plaintiff. He could not afterward pay to the assignor, or to any person but the plaintiff.

Both parties *being citizens of Iowa*, and the plaintiff having actually brought suit in Iowa to collect his debt, the plaintiff, though suing upon a New York judgment, was an Iowa creditor, and the

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defendant would have no more right, as against the plaintiff, subsequently and pending the action, to remove to New York and acquire a discharge which should be valid, as against the plaintiff's action in Iowa, than if the defendant had never previously resided in New York, or had, while residing there, made the contract with the plaintiff, at the time a resident of Iowa.

I need not stop to point out the injustice and unreasonableness of holding that a debtor, pending an action against him, may change his residence, obtain an *ex parte* discharge, resume his residence in the state in which his creditor resides, and then be allowed to plead such discharge as an effectual bar to the plaintiff's action.

The court of no state could, in justice to its citizens, ever give its sanction to such a doctrine, unless it conceived that it was so bound by authority that it could not unloose itself from its grasp.

The court below undoubtedly proceeded upon the idea of the supreme court of Massachusetts in *Scribner v. Fisher*; and counsel undoubtedly did not call its attention to the case of *Baldwin v. Hale*, since it is not referred to in their briefs in this court.

It was suggested on the argument, that the court of New York would have control over judgments rendered in that state, and that the case was, or might be, different from what it would, if the contracts on which the judgments were rendered had been transferred to the plaintiff, a resident of Iowa, and had never been reduced to judgment in New York.

The decisions in this court (*Burtis v. Cook & Sargent*, 16 Iowa, 194), treat a judgment rendered as a chose in action. It is a debt, or the record evidence of a debt. The plaintiff, as the assignee, has the same rights as if he had, while a citizen of Iowa, recovered judgment in his own name in New York. In that case, it is plain that it could not be discharged against his assent by a state insolvent proceeding. This suggestion comes right back to the point before discussed, and which has been finally set at rest by *Baldwin v. Hale*, viz. that, if the creditor is a non-resident of the state, a discharge under a state law cannot affect him, unless he voluntarily becomes a party to the proceeding; and this is the case, irrespective of where the contract was entered into, or was to be performed.

Place of making, or place of performance, is utterly immaterial in all cases where the creditor is not a citizen of the state granting the discharge.

Citizenship of the parties, and not the *place* of the making, or

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the place fixed for the performance of the contract, is the controlling element.

As the plaintiff was undoubtedly a citizen of Iowa at the time the defendant obtained his discharge in New York, it is not necessary to decide the question, so ably debated by counsel, whether the defendant did in fact acquire a residence in New York at the time he applied for relief under its insolvent laws.

To my mind this is doubtful, but as the evidence is conflicting and by no means decisive, we ought not, on this ground, to disturb the judgment of his honor below. This has made it necessary to dispose of the case on the assumption that the defendant was not a citizen of Iowa, but was a citizen of New York, when he applied for his discharge.

Reversed.

TAYLOR, appellant, v. SHORT, administrator, *et al.*

(27 Iowa, 361.)

Mortgage — release of part of mortgaged premises.

▲ mortgage upon several lots is a common burden, and if the mortgagee, with knowledge that the mortgagor has aliened a portion of the lots, releases one of the other mortgaged lots, he thereby discharges the aliened lots to the extent of the *pro rata* value of the portion released.

But if the mortgagee could show that the mortgage was no lien on the released part, and that the owners of the other portion sustained no injury by such release, it would be otherwise.

APPEAL from Des Moines district court.

This action was brought to foreclose a mortgage. The defendant, are two subsequent purchasers of mortgaged premises, and defend on grounds stated in opinion. The decision below was in favor of defendants, from which plaintiff appeals.

Tracy & Newman, for appellant.

Geo. Robertson, for appellees.

DILLON, C. J. Plaintiff had a mortgage, or deed of trust, upon certain lots. The district court finds that he released one of the

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lots—the Smith lot. The evidence shows that he did this with knowledge that the appellees or their grantors had purchased, after the execution of the mortgage, other lots covered by it. The present action seeks to foreclose the mortgage for the *full amount* due thereon, against the lots owned by the appellees. The appellees insist, that, as the mortgage was a common burden upon all the lots embraced in it, each lot is charged with its fair proportion of the debt and that if the plaintiff, with actual knowledge of the alienation to the appellees, releases the mortgage as to part of the property, he thereby discharges the portions owned by the appellees to the extent of the *pro rata* value of the portion released. *Stevens v. Cooper*, 1 Johns. Ch. 425; *Guion v. Knapp*, 6 Paige Ch. 35, 42; *Patty v. Pease*, 8 id. 277; *Duester v. McCamus*, 14 Wis. 307; *Parkman v. Welch*, 19 Pick. 231.

This general rule we do not understand the appellant to controvert or deny; but his counsel say, in their written argument, that “when the Smith obligation (for the lot plaintiff released to Smith) became due, the plaintiff sued it and was defeated, and failed to collect, because of imperfection in the title, and refuses to credit the mortgage debt with the amount of it, because never collected.”

The records in the two cases of the plaintiff against Smith are not before us. We do not know why the plaintiff failed therein. We find nothing in the record showing that he was unsuccessful, because Smith obtained or had no title.

If the plaintiff could show that his mortgage was no lien upon the Smith lot, or that, by releasing it, the appellees could not be and were not injured, the claim of the latter could not be sustained.

We see nothing in the case to take it out of the rule of equity insisted upon by the appellees. The plaintiff's discharge of the Smith lot from his mortgage was his own voluntary act; and it operated under the circumstances, as was held by the district court, *pro rata* to discharge the lien thereof, as respects the property of the appellees, the appellant having full knowledge of the sale to and the rights of the appellees.

We see no error in the action of the court in disallowing to the plaintiff, as against the appellees, the expenses of the litigation, in attempting to enforce the collateral against Smith and the other parties. The decree below was equitable, and must be

Affirmed.

STATE V. STRATTON, appellant.

(27 Iowa, 420.)

Forgery—detaching condition from promissory note.

The detachment of a written condition, made at the same time and upon the same paper, from a promissory note, if altering its character, and done fraudulently, is forgery.

APPEAL from Blackhawk district court.

Defendant and one Willis were indicted jointly for forgery in altering a promissory note for \$25 and interest, made payable to O. H. Stratton or bearer, by one Brown. The alteration consisted in tearing off therefrom the following condition, which was underwritten upon the same paper at the time the note was made:

“When the said Brown sells fifty dollars worth of the water elevator, and pays twenty-five dollars, his note to be considered paid.”

It was charged that the defendants, after the instrument was altered, uttered it as true to one Fox.

The defendant was convicted below, and sentenced to one year's imprisonment. A motion for a new trial being overruled, defendant appeals, upon this, among other grounds, “that the condition which it is alleged defendant removed, would not extend the time of payment, but the note would, notwithstanding, become due at the time therein fixed.”

Boies & Allen, for appellant.

H. O'Connor, attorney-general, and *M. M. Trumbull*, district attorney, for the state.

DILLON, C. J. I. After having examined the testimony, this court is of opinion that it sustains the verdict of the jury. The defendant produced no evidence of any kind. An outline of the case, made by the state, appears in the statement. There was, therefore, no error in the action of the district court in overruling this ground of the defendant's motion for a new trial. It is not deemed necessary to recount the evidence at length, or to comment upon it

II. The defendant asked the court to instruct the jury, "that when two are charged with the commission of a crime, and it is not proved beyond a reasonable doubt that the person on trial committed the crime, the jury are bound to acquit," altered by adding "unless the jury are satisfied that he is an accomplice in the act charged, aiding or abetting the other."

In the written argument the appellant's attorney complains of this alteration, "for the reason that there was no evidence tending to prove that Stratton was an accomplice with Willis in the fraudulent uttering of this note, and the alteration has a tendency to mislead the jury."

In our opinion there was evidence sufficient to justify the addition which the court made to the instruction as asked. Not only so, but the case made, as well as the peculiar frame of the instruction demanded, rendered it highly proper for the court to refer to the law relating to accomplices. The appellant does not claim that the addition lays down any erroneous principle of law, but only that it was inapplicable to the case. This ground of objection is not well taken.

III. The main point made for a reversal is, that the condition (so called) which it is alleged that the defendant detached from the instrument, did not extend the time of payment, or in any manner increase the liability of Brown, the promisor. If the alteration did not in any manner affect the legal character of the instrument, did not give to it any different effect or any new operation, and was not material as respects the liability of the promisor, or the value of the instrument, it would not be forgery, or indictable under our statute as such. This much may be conceded; but the converse is also true.

The portion of the instrument which was detached, called the "condition," was made contemporaneously with the note, *referred to it*, and was part of it. The "note" and "condition" together constituted one instrument. The condition, in terms, refers to "this note," and was part of the contract. See *Osborn v. Fulton*, 1 Blackf. 233; *Frischli v. Cowen*, id. 350; *Elmore v. Higgins*, 20 Iowa, 250; *Wheelock v. Freeman*, 13 Pick. 165; *Johnson v. Heagan*, 13 Me. 329; and see cases referred to, 2 Parsons N. and B. 539, 545, 546.

With the condition attached, the contract was not a promissory note in the sense of the law merchant, and hence, if transferred as made, even before due, the assignee would be bound to take notice

of the matters named in the condition. With the condition annexed, the instrument was, to use an apt expression of Chief Justice GIBSON, "a courier with luggage." With the condition removed, Brown appears as the maker of a negotiable promissory note. If such a note is transferred before due, for value and without notice, the holder cuts off any equities or set-off the maker may have. The alteration, therefore, tended to the prejudice of Brown. It was material in its character; it gave a new quality and effect to the instrument.

It has been decided, and most properly, that the interlineation or insertion of the words "bearer" or "order," in a note, were material alterations, and, if done without the maker's knowledge or assent, would avoid the instrument. *Scott v. Walker*, Dudley (Ga.), 243; *Johnson v. Bank*, 2 B. Mon. 350; *Bruce v. Wescott*, 3 Barb. 374; 2 Parsons N. and B. 562, 564.

The alteration is material, because it converts an instrument which is non-negotiable into one which is negotiable, and this may have a very prejudicial effect upon the maker.

If such an alteration is fraudulently made, it is under our statute forgery.

It is to be borne in mind, that this is a case where the annexed agreement was made contemporaneously with the note, was part of it, and together with it constituted one contract.

Removing it altered the instrument as Brown made it, caused it to appear that he had given his assent to an instrument to which, in its altered shape, he had never assented (1 Hawk. P. C. ch. 7, § 2); gave to it a new quality, effect and operation (2 East P. O. ch. 19, § 4, 855); and so, within the statute (Rev. § 4253), and the authorities, the act, if fraudulently done, is forgery. *Rex v. Treble*, 2 Taunt. 328; 2 Leach, 1040; Russ. & Ryan, 164; 2 Russell on Crimes, 319, 320, 346; and see cases before cited.

We place our judgment upon the plain ground that the alteration was material, in that it converted an instrument which was not negotiable by the law merchant into one which was, and was thus of a character which would tend to injure Brown and deceive others.

I think it could be fairly shown that the true meaning of the "condition" was, that, until Brown should sell fifty dollars' worth of the water elevators, he was under no obligation to pay the twenty-five dollars, and, therefore, to destroy this, so as to make it appear that Brown's obligation to pay was absolute at the end of six

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months, was to alter the character of the contract in a most material respect. But, as the language of the condition is not free from ambiguity, the court prefers to rest its judgment upon the basis above indicated.

Affirmed.

SWEETLAND V. ILLINOIS AND MISSISSIPPI TELEGRAPH COMPANY
appellant.

(27 Iowa, 422.)

Telegraph companies. Liability for mistake in transmission of messages.

A telegraph company, notwithstanding special printed conditions at the head of the despatch sent, exonerating it therefrom, is responsible for mistakes happening in consequence of its own fault, such as want of proper skill or ordinary care on the part of its operators, or the use of defective instruments, but is not, under those conditions, responsible for mistakes occasioned by uncontrollable causes, such as atmospheric electricity, provided these mistakes could not have been ascertained and guarded against, or prevented by the exercise of ordinary care and skill on the part of the operating agents of the company.

Telegraph companies cannot adopt general printed rules, exacting, as a condition of sending messages, that the sender shall exonerate or release the company from damages caused by defective instruments, or by want of proper skill in the operators, or by their failure to use due care.

A condition, requiring a party who desires a message to be sent with absolute correctness to have the same repeated, is a proper one, and where the condition, as to repeating, exists, and is known to the party, or where he is bound to take notice of it, and a mistake occurs in an unrepeatable message, the mere proof of such mistake, without some other evidence of carelessness on the part of the company, will not make it liable. It must be shown that the mistake was caused by the fault of the company.

To make the declaration of an agent binding upon his principal, it must be within the scope of the agency, and constitute part of the *res gesta*.

APPEAL from Cedar district court.

This action was brought for damages, caused by a mistake in a telegraphic message, sent over defendant's lines. Such message was sent on the 28th day of December, 1866, by the correspondents of the plaintiff, at Chicago, to plaintiff, who was engaged in the business of buying hogs, in the village of Mechanicville, Iowa. The

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mistake was admitted, and it was agreed, that, if plaintiff was entitled to recover, the damages should be \$950 and interest.

The character of the mistake appears in the opinion.

The message sent was written upon the blank portions of a printed form, which the defendant furnished to its customers generally, and to the correspondents of plaintiff, who were a commission firm, in Chicago, particularly. The printed form was as follows:

“CATON LINES.

“Illinois and Mississippi Telegraph Company, in connection with all other lines in the United States and Canadas.

“Terms and conditions on which messages are received by this company for transmission.

“In order to guard against, and correct as much as possible, some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be repeated, by being sent back from the station at which it is to be received, to the station from which it is originally sent. Half the usual price will be charged for repeating the message, and, while this company, in good faith, will endeavor to send messages correctly and promptly, it will not be responsible for errors or delays, in the transmission or delivery, nor for non-delivery, of repeated messages, beyond two hundred times the sum paid for sending the message, unless special agreement for insurance be made in writing, and the account of risks specified in this agreement, and paid at the time of sending the message. Nor will the company be responsible for any error or delay in the transmission or delivery, or for the non-delivery, of any unrepeatd message, beyond the amount paid for sending the same, unless, in like manner, specially insured, and the amount of risk stated therein, and paid for at the time. No liability is assumed for errors in cypher, or obscure messages; nor is any liability assumed by this company for any error or neglect by any other company over whose lines this message may be sent to reach its destination, and this company is hereby made the agent of the sender of this message, to forward it over the lines extending beyond those of this company. No agent or employee is allowed to vary these terms, or make any other or verbal agreement, or any promise as to the time of performance, and no one but a superintendent is authorized to make a special agreement for insurance. These terms apply through

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the whole course of this message, on all lines, by which it may be transmitted.

"J. D. CATON, *President*.

"OTTAWA, ILL."

The message was delivered to defendant in Chicago, but no direction was given to repeat it, and only the regular tariff for unrepeatd messages was charged.

The plaintiff acted on the faith of the message received, and purchased a quantity of hogs at a higher rate than he would have done if the message had been sent correctly. Evidence was introduced at the trial, tending to show that the mistake was caused by an imperfect instrument at the receiving office, which was controverted by testimony introduced by defendant. The jury found for the plaintiff, and from the denial of a motion for a new trial the defendant appealed.

J. D. Caton and Wolf & Landt, for appellant.

Cook & Drury, for appellee.

DILLON, C. J. Properly to examine and consider the important, and, in this state, undecided questions arising on the record, this cause was held over from the last term. We are now prepared to decide it.

The original message left with the defendant for transmission was this:

"Live hogs, six (6), six quarter ($6\frac{1}{4}$). Dressed, six three-quarters ($6\frac{3}{4}$), seven (7), firm."

As delivered to the plaintiff it read:

"Live hogs, six three-quarters, seven (7), firm."

From the middle of the message was omitted the words:

"Six (6), six quarter ($6\frac{1}{4}$), dressed."

The effect of the omitted words was, that the price of dressed hogs was stated to be the price of live hogs. That the mistake occurred is not controverted. That the plaintiff acted upon the message, as delivered, purchased hogs upon the basis of value therein stated, and was damaged in consequence to the extent of \$950, are undisputed facts.

The general question in the case on the merits is, whether the

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defendant is liable for this mistake, and the damages which it occasioned to the plaintiff.

The solution of the question involves the consideration of several others, which we proceed to notice in proper order.

The plaintiff, in the first place, maintains that the defendant is liable for this mistake, by the express provisions of the statute. Rev. § 1353.

The section is this:

"The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, as well as for all damages resulting from a failure to perform any other duties required by law."

To this portion the defendant answers, that the statute applies only when the parties have made no special contract; that the legislature did not intend to prohibit parties to enter into such reasonable stipulations as they might deem proper respecting the transmission of messages; that, in this instance, the parties, viz., the company, on the one side, and the plaintiff, through his agents, on the other, did regulate their respective rights by the conditions and terms printed at the head of the message; and it is to these conditions and terms, so far as they apply, and not the general declaration of the statute, that resort must be had, to determine the measure of the defendant's liability.

To this the plaintiff rejoins, that the statute is founded on public policy, and is declarative of it; that it authorizes no regulations or contracts restricting the liability it imposes; and it is argued, that, since it is shown that, by repeating messages, mistakes may be avoided, it becomes, under the statute, the *duty of the company itself to repeat the message* — a duty which it cannot, by regulations, shift on to the public.

On this point the court below held with the defendant, as will be seen by reference to the instruction numbered one, copied in the statement of the case. If there was any error in this, it is one of which the defendant cannot complain. Our inclinations, however, are, that the point was rightly ruled below; but, since the exigencies of the present appeal do not require any positive determination of it, we pass it, with the statement, that we will concede, for the purposes of this case, that the statute does not make the defendant liable, at all events, and that it is competent for the company, notwithstanding the statute, to enter into stipulations, or to adopt *reasonable* rules.

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conditions and regulations, governing the transmission of messages; and it will also be conceded, that the regulation respecting the repetition of messages (the only one involved in this case), is reasonable, and binding upon the parties. It is the more proper to pass the point without any decisive ruling, because it has occurred to us — though counsel, we believe, did not allude to the circumstance — that, since the message was delivered to the defendant *in another state*, it might be debatable whether our statute had any application to the case, even though the mistake may have happened in that part of the defendant's line which is situate in this state.

Respecting the right to limit liability by stipulation, or printed conditions, see, generally, *Wann v. Telegraph Company*, 37 Mo. 472, 1866 (similar statute to Iowa); *Camp v. Telegraph Company*, 1 Met. (Ky.) 164, 1858 (right affirmed without aid of statute); *Ellis v. Telegraph Company*, 13 Allen (Mass.), 226, 1866; *MacAndrew v. Telegraph Company*, 17 C. B. 3, 1855; *Telegraph Company v. Carew*, 15 Mich. 525, 1867; S. C., 7 Am. Law Reg. (N. S.) 18; *Birney v. Telegraph Company*, 18 Md. 341, 1862; *Breese v. Telegraph Company*, 45 Barb. 274, 1866; and see cases collected, 2 Am. Law Rev. 615-632; and by Prof. Dwight, 4 Am. Law Reg. (N. S.) 192-199.

Having assumed the validity of the printed conditions, so far as respects the repetition of messages, and that the message in question was sent subject thereto, the inquiry next arises, what is the meaning and effect thereof, so far as they relate to the facts of the present cause.

As to the cause of the mistake, the parties differed. One of the positions assumed by the plaintiff, if not the main one, was that the mistake was caused by a defective instrument in the office of the company at the place at which the message was received. He offered evidence tending to establish his theory. This theory was denied by the defendant, and it offered evidence tending to show that the mistake could not have been occasioned by the alleged defect in the instrument, but must have been occasioned by uncontrollable atmospheric causes.

The third and fourth instructions of the court (*see statement*) relate to these two conflicting theories.

In the third instruction, the court directed the jury that, although the contract was made as claimed by the company, yet "it was still the duty of the defendant to employ skillful operators and proper instruments, * * * and if the message was not transmitted

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correctly, not by reason of its not being repeated, but because of unskillful operators, or defective or imperfect instruments, the defendant is liable."

The fourth instruction lays down the converse proposition, and says to the jury, that, if the mistake was caused "by the interruption of the working of the telegraph by atmospheric electricity or other unavoidable or uncontrollable cause, then the defendant is not liable."

The tenth instruction requires that the company, notwithstanding the special conditions, shall keep good instruments. The eleventh instruction substantially tells the jury that it is incumbent on the plaintiff to show that the mistake happened by reason of a defective instrument. The twelfth instruction lays down the law to be, that, if the mistake happened in consequence of the want of ordinary skill in the operators, or in consequence of the use of imperfect or defective instruments, the defendant would be liable. And, from the special terms and conditions at the head of the printed message, the defendant could not well complain of this statement of the law. On general principles it would be bound to employ skillful operators, to exercise due care, and to use good instruments. And, on general principles, if it omitted this duty, and damage ensued to a party in consequence of such omission, he would have his action therefor.

We do not understand the learned counsel for the company to insist that the general principles of law stated in the instructions of the court would not be correct, if it were not for the printed conditions under which the message was sent, and which, it is insisted, modify the common-law liability of the company.

It is claimed that these conditions govern the rights and measure the liabilities of the parties, and that their effect is to exonerate "the company from any loss which may arise from mistakes in messages, whether arising from unavoidable causes, or *the improper or negligent conduct of its servants.*" It is insisted by the distinguished counsel for the appellant, that such conditions are reasonable, because "the element used is subtle, intangible, fitful, capable of only partial control by man, and always liable to great interferences from causes entirely beyond human control. Atmospheric electricity is only one of the many difficulties with which the telegrapher has to contend. At first, the mode of dealing with these difficulties was not understood, nor is it yet matured, although men of talent, of scientific attainments, and of the closest observation, have devoted many years to the subject. Enough, however, has

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been learned to demonstrate absolutely the impossibility of avoiding mistakes, except by repeating messages. * * Contracts such as the present are reasonable, and such as the company had a perfect right to make. Still, we are liable for gross negligence, notwithstanding the stipulation would exempt us. This is the hardest rule that has ever been held against a telegraph company." And he objects to the third instruction, "because it holds the company liable for ordinary negligence, instead of gross negligence;" and to the fourth instruction, because it is contended that its effect is, that if the mistake was not produced by unavoidable causes the company is liable.

The substance of the court's instructions, taken together, is, that the company, notwithstanding the special printed conditions, is responsible for mistakes happening in consequence of its own fault, such as want of proper skill, or ordinary care, on the part of its operators, or the use of defective instruments; but is not, under those conditions, responsible for mistakes occasioned by uncontrollable causes, such as atmospheric electricity, provided these mistakes could not have been ascertained and guarded against, or prevented by the exercise of ordinary care and skill on the part of the operating agents of the company.

Thus viewing the instructions of the court, they state the law correctly, at least not unfavorably to the defendant. The considerations mentioned by the appellant's counsel are quite sufficient to justify a court (in the absence of a statute otherwise settling the liability of the company) in holding reasonable the condition as to repeating messages, and exempting it from liability for mistakes in unrepeatd messages, occasioned by unavoidable or uncontrollable causes, provided proper instruments have been used, and proper care and skill exercised by the company's employees to avoid or prevent the mistake.

But the arguments suggested furnish no reason why a company should be allowed to make general printed conditions, which should have the effect to relieve it from liability for "the improper or negligent conduct of its servants." Telegraph companies, like railroad companies, owe important duties to the public. Generally, there are no competing lines, and, if so, the business is necessarily in the hands of a few. These companies must act in good faith toward the public, and cannot, by general conditions, demand unreasonable concessions from those proposing to send messages.

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It is not necessary to discuss what might be lawfully done by a special contract.

But I deny that companies can adopt general printed rules, exacting, as a condition of sending messages, that the sender shall exonerate or release the company from damages caused by defective instruments, or by the want of proper skill in the operators, or by their failure to use due care.

The court has carefully examined the printed conditions, underneath which the message in question was written, and its opinion is, that none of these conditions should be construed as undertaking to exempt the company from liability caused by its own fault. These conditions, fairly viewed, presuppose or assume that the company will discharge its reasonable, common-law duties, by using good instruments, and by employing skillful agents, who shall, in the performance of their duties, exercise due and proper care.

The statements in these "conditions," as to atmospheric causes, and the promise "in good faith to endeavor to send messages correctly and promptly," shows that the purpose obviously is to guard against liability for mistakes arising from atmospheric or other like causes, not to provide for exemption from liability for mistakes caused by its own *avoidable* faults.

If any sinister or unfair purpose, such as exoneration from liability for its own want of due care, was intended, such purpose—conceding its lawfulness—should be unmistakably expressed, and will not be held by the court to lurk in any general language.

Nor can we assent to the proposition maintained by the appellant's counsel, that, under such conditions, "the company is held for *gross negligence* only, this being the hardest rule that has ever been held against a telegraph company."

We have examined all the leading cases known to have been decided, with respect to this subject, and have not found one holding (when this was the exact point in judgment) that the ordinary printed conditions, as to repeating messages, have the effect to release the company from mistakes caused by its own want of ordinary care.

There is a *dictum* in *MacAndrew's Case*—the first case which arose (17 Com. B. 3, 1835), to the effect that, by regulations, the companies may protect themselves from liability for mistakes in unreported messages, except those caused by their gross negligence,

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and this expression has been incautiously copied, and used *arguendo* by other courts, as, for instance, in *Wann v. Tel. Co.*, 37 Mo. 472.

Without adverting to the difference between the English and American rule as to the right of a carrier to limit his liability and the mode of doing this when it is allowed, it is sufficient to repeat that it never has been held that a telegraph company may, by general printed conditions, stipulate for exemption from all liability except for gross negligence.

In view of the importance of the principles involved, and the consideration that the law as to the rights and responsibilities of telegraph companies is, in a large measure, yet to be settled, I may be justified in departing from my usual course, and review briefly some of the cases bearing upon the question respecting the effect of the condition as to repeating the messages upon the liability of the company.

In *Ellis v. Tel. Co.*, 13 Allen (Mass.) 226, 1866, the mistake in the dispatch consisted in making it read \$175 instead of \$125. The company had established the usual condition as to repeating and insuring messages. In the statement of the case occurs the important fact: "There was *no evidence of carelessness* or negligence, except the error in the sum, which was made by some agent of the company in transmission." The supreme court, in an opinion prepared by the able and distinguished Chief Justice BIGELOW, held the stipulation as to repeating messages to be reasonable, and that, so far as reasonable, it would limit the liability of the company. It also held, that the plaintiff was not entitled to recover without further proof of carelessness than that there was an error in the message as delivered. After critically examining the case, I am of opinion that it is only *authority* for these two points. The reversal of the judgment below in that case must be supported on the ground that, under the circumstances, the plaintiff ought to show carelessness on the part of the company or its agents, and that, as the message was not repeated, this could not be inferred (as the court below had instructed) from the mere fact that a mistake in the sum had been made. If this be the true view of that case, as it undoubtedly is, it commands cordial assent.

It is said by Chief Justice BIGELOW, near the end of the opinion, that "of course the defendants would be liable for any *negligence* causing damage, which would not have been prevented by a compliance with these rules," viz., those relating to the repetition of mes-

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sages. If it is meant to be asserted, as might be implied, that a company can, as respects unrepeatd messages, make conditions exempting themselves from all liability for negligence causing damage, this is a proposition from which, in this breadth, I must withhold my concurrence. *Wann v. Tel. Co.*, 37 Mo. 472, 1866, is very much like *Ellis'* case, just mentioned.

The plaintiff ordered, by telegraph, salt from New York, by "*sal.*" As the dispatch was delivered, it read, "*ship by rail.*" This was done and damage caused, and suit brought. The plaintiff did not repeat. The company had the ordinary condition, as to repeating dispatches. It appeared that "*the only evidence to sustain the charge of carelessness was the mistake in the message.*" On this state of facts, the company was held not liable. The case cannot, I think, be fairly said to *decide* that the effect of not repeating is to exempt the company from liability for want of *ordinary* care, since there was no evidence of the want of such care on its part. The judgment below, in this case was, in my opinion, properly reversed, but the reversal should be placed on the ground that the plaintiff offered no evidence to prove neglect (except the error in the message), and the instructions of the court below held the company (under the regulations as to repeating) to too strict a measure of liability.

In *Camp. v. Tel. Co.*, 1 Met. (Ky.) 164, 1858, a message containing an offer for the purchase of whisky was delivered, reading 16 cents per gallon instead of 15 cents. Usual condition as to repeating.

The plaintiff *neither averred* nor *proved negligence* on the part of the company, or want of proper skill in its agents, but based his action wholly upon the notion that the company was, by law, bound to transmit the message correctly. It was held, and most properly, that the condition as to repeating was reasonable, and that the company was not liable.

The court say: "The plaintiff must, therefore, be regarded as having sent the message at his own risk, inasmuch as he failed to have it repeated, and, consequently, the company [under the case made] is not liable for the mistake."

This is right; but the case does not hold that such a condition can exempt a company from the duty of exercising proper care to secure correct transmission, even though the message be not repeated.

Of the same general character is *Breese v. Tel. Co.*, 45 Barb. 274,

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1866. The mistake (\$7,000 instead of \$700) was caused "by some error of some of the defendant's operators, *the precise cause of which is unknown*," and it was held that the condition as to repeating was a defense. But the case does not decide that such condition will exempt the company and its agents from the exercise of proper care to secure a correct transmission.

In accordance with these views is the opinion of a distinguished jurist. Speaking of *McAndrew's Case*, Judge Redfield (2 Railway, 3d ed., p. 244, pl. 12) says: "In the case last cited, a *quere* is made, how far the company, in such case (exempting itself from liability unless message is repeated), will be liable for gross negligence. We think there ought to be no doubt as to the responsibility of the company in such cases, *for even ordinary neglect*. And the whole extent to which such a condition should be held to qualify the responsibility of the company is, that it will not be held absolutely responsible as insurers of the accuracy of transmitting, unless repeated and paid for as such." And he repeats the same view in his more recent work on carriers, just published. Redf. on Carr. §§ 552, 557, 561.

In the *Tel. Co. v. Carew* (*supra*), Judge CHRISTIANCY, *arguendo*, says: "But doubtless the use of good apparatus and instruments would be required, and reasonable skill, and a high, perhaps the very highest, degree of care and diligence in their operation."

These authorities above cited fairly warrant the proposition, that where the condition as to repeating exists, and is known to the party, or where he is bound to take notice of it, and a mistake occurs in an unrepeatable message, the mere proof of such mistake, without some other evidence of carelessness or negligence on the part of the company, will not make it liable.

To apply that principle to this case: The plaintiff, to recover, must prove something more than the mistake and the damage. He must show that this mistake was caused by the fault of the defendant, and that it might have been avoided if the defendant's instruments had been good ones, and if the defendant's agents had possessed the requisite skill, and exercised the proper care and diligence in respect to the transmission and receipt of the message in question.

As the judgment must be reversed, and a new trial ordered, for the error of the court in the admission of evidence, we have decided those questions of law which would necessarily arise on the re-trial.

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Appellant's counsel contend, that the verdict is against the evidence.

Upon this point we do not deem it necessary or expedient to express any opinion. The evidence on the next trial may not be the same.

If the plaintiff can establish that the instrument was not a reasonably efficient one, or not in good repair and condition, and that by reason thereof the mistake was caused, he will thereby make out a cause of action, notwithstanding the printed conditions at the head of the message.

So, if the Clinton operator at the intermediate station, or Mr. Short, the operator at the terminal station, did not, under the circumstances, considering the weather, the character of the message, the nature of the interruption and the like, use that degree of skill, care and diligence which was reasonably required, and, in consequence, the mistake happened, when, by the exercise of such skill, care and diligence the mistake in question would have been avoided, the company is liable.

But if the error is not shown to be attributable to the fault of the company, the plaintiff must fail. And, if the jury believe, from the whole evidence, that the mistake was occasioned by atmospheric causes, which a reasonable degree of care and skill could not guard against and prevent, it is their duty to find for the defendant.

One other point ought, perhaps, in this connection, to be referred to, and the law in relation thereto stated, since it may again arise.

We do not understand the pleadings to limit the plaintiff to proving the apparatus to be defective, in order to make out his case, but he alleges generally the negligence of the defendant in the transmission of the message.

The defendant has contended in this court that the mistake in the message arose in this way:

While the message was being received by Mr. Short, the receiving operator at the place of destination, atmospheric electricity affected the line west of the sending operator. This happened when the receiving operator, Mr. Short, was at the first word "six." The machine then *spluttered*. The sending operator was ignorant of this, and continued sending the message until he had passed the last "six." Meanwhile the receiving operator gets his instrument into "adjustment," that is, he regulates the tension of the rubber springs so as to adapt the machine to the strength of the current,

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and he then says to the sending operator to repeat from the word "six," that is, from the last word which was received plainly. The receiving operator meant the first six; the sending operator supposed he meant the last six, for he had continued to send the message in ignorance of the faulty working of the line beyond him. The sending operator repeated from the last "six," and from that only, in consequence of which all the message between the two words "six" was omitted.

If these were the facts, is the defendant liable? The general principles governing this inquiry have been before stated. If the operating agents of the company used, under the circumstances, reasonable and proper care to guard against the mistake, then there is no liability, for there would be no negligence, and if no negligence the company is protected by the printed condition as to repeating the message.

On the other hand, if the operating agents of the company did not use ordinary, usual and reasonable care in transmitting the message, and if the want of care (and not atmospheric causes, or the infirmities of telegraphing) caused the mistake, the company is liable. But the plaintiff not having repeated the message, it is incumbent on him to satisfy the jury that the mistake was caused by the defendant's negligence, and would not have occurred had the defendant's agents used proper care in the transmission and receipt of this particular message.

As appears in the statement of the case, the court, against the defendant's objections, admitted the plaintiff to give in evidence certain admissions of Short, the operator, made at a period distinctly subsequent to the delivery of the message. The rule of law respecting the admissibility of the declarations and admissions of agents to bind their principals is well settled.

To be binding, the declaration must be within the scope of the agency, and constitute part of the *res gestæ*. The statement of the law on this point by Mr. Greenleaf (1 Ev. § 113) is very happily expressed. "The admission or declaration of the agent binds the principal only when it is made during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*," etc. And the law, as thus laid down, has been before recognized in this court. *Furner v. Turner*, 1 Iowa, 53; *Wiggins v. Leonard*, 9 id. 194, which, in principle, applies to this case. And see also *Story on Agencies*, §§ 134, 137, and cases cited.

The law is well illustrated by two recent cases in Massachusetts. In the one, an action by a passenger against a railroad company for the loss of his trunk, the admission of the conductor, baggage master, or station master, as to the manner of the loss, made the next morning, in answer to inquiries for the trunk, are competent against the company, it being part of the duties of such agents to deliver the baggage of passengers, and to account for the same, if missing, and inquiry is made within a reasonable time. *Morse v. R. R. Co.*, 6 Gray, 450.

But, in an action against a railroad company for damages by a collision, through the alleged negligence of the engineer, his statements as to the accident, made a few days afterward, were held not competent against the company. *Robinson v. The R. R. Co.*, 7 Gray, 92.

The message, in the case at bar, had been delivered from one to three days before the alleged declarations were made by the agent, which were, in part at least, narrative of a past occurrence, and no part of the *res gestæ*—no part of a depending transaction; and it falls within the class illustrated by the case last cited, and not by the one first cited, from Gray's reports.

In the opinion of the court, it is very doubtful whether any portion of the declarations or admissions of Mr. Short was competent. But, certain it is, that his statements, that he "believed the instrument was the cause of the mistake; that he had written to the company two or three times about it, and that they paid no attention to it," are clearly incompetent, and admissible on no conceivable principle.

We have looked at the case to see whether, conceding the incompetency of this portion of the evidence, we could fairly say that it did not prejudice the defendant. But, when it is remembered, that one of the principal points of contest before the jury related to the question of fact whether or not the instrument was defective; that to this question both parties directed a large portion of the evidence; and that this subject occupies a considerable part of the charge of the court, the materiality of the admissions of Short, erroneously allowed to go to the jury, is too manifest to admit of dispute. Under these circumstances, this court cannot affirm that it reasonably appears that the evidence did not unjustly prejudice the cause of the defendant.

And for this reason the judgment of the district court must be

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reversed. The question made by the defendant, as to non-liability for interest on the damages, is settled against it by the stipulation on file, which fixes the amount of the recovery, if there is a liability, and provides that the sum named shall be with interest.

Reversed.

LIPPENCOTT v. ALLANDER *et al.*, appellants.

(97 Iowa, 400.)

Ferry—franchise not terminated by death of grantee.

A ferry license when granted becomes the property of the grantee, and is a private right, subject only to the governmental control growing out of its other nature of *publici juris*. When granted in an estate for years, the death of the grantee can no more terminate it than the death of a tenant can terminate a like estate in lands.

APPEAL from general term, second district, Van Buren district court.

The board of supervisors of Van Buren county issued a license to A. J. Kerr, authorizing him to operate a ferry on the Des Moines river between Bentonsport and Vernon. Subsequently, Kerr died, and this action was brought to determine the right of those operating the ferry to the franchise for the same, the plaintiff claiming that the license was vacated by the death of Kerr. The district court held that the death of Kerr vacated the license, and the general term affirmed the decision. From all which defendants appeal.

Francis Semple, for appellants.

J. C. Knapp & Bertrand Jones, for appellee.

BROCK, J. But one question is presented by the record for our determination; it is this: Is a ferry license vacated or the franchise lost by the death of the party to whom it was granted?

The right acquired under a ferry license is called a franchise, and is conferred by grant from the government, and with an implied

covenant, on the part of the government, not to invade the right vested, and, on the part of the grantee, to perform the duties and conditions prescribed by the grant. 3 Kent's Com. 458. This franchise is included in the general denomination of "incorporeal hereditaments," a term used to distinguish one of the different kinds of things real. It partakes of a double nature and character. So far as it affects or concerns the public, it is *publici juris*, and is subject to governmental control. The legislature may prescribe the manner of granting it, to whom it may be granted, the conditions and terms upon which it may be held, and the duty of the grantee to the public in exercising it, and also provide for its forfeiture upon the failure of the grantee to perform that duty. But, when granted, it becomes the property of the grantee, and is a private right, subject only to the governmental control growing out of its other nature of *publici juris*. *Benson v. Mayor of New York*, 10 Barb. (S. C.) 223. In this character and nature it is essentially in all respects property, and is governed by the same rules as to its enjoyment and protection, and regarded by the law, precisely, as other property. *Conway v. Taylor's Ex'r*, 1 Black. 632; *Bowman's Devises v. Watham*, 2 McLean, 376; *Dundy v. Chambers*, 23 Ill. 370; 3 Kent's Com. 458.

The fact that it is conferred by grant from the government, and may be forfeited by mis-user or non-user, does not argue that it is not property, or that it may be lost in a way or manner which will not deprive the owner of other property of his rights therein.

Under the provisions of our statute, ferry licenses are granted by the board of supervisors of the county, for a limited time, and to such persons as, in the opinion of the board, will best serve the public interest, preference being given to the owner of the land, or of a previous ferry. Conditions and terms may be imposed by the board, as prescribed by the statute, and for the violation thereof the license may be revoked. No restriction is imposed upon the sale or transfer of the franchise, and there is no provision that, upon the death of the party to whom the license was issued, it shall be vacated and the franchise lost.

It may be sold upon execution as real property, except that the purchaser may take immediate possession of all property ordinarily used in the exercise of the franchise, which, it is provided, is transferred by the sale. The purchaser at once enters upon the exercise of the franchise. It is exposed to sale differently from other prop-

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erty; he who will take the franchise for the shortest time, within the period for which the license was issued, in satisfaction of the execution, shall be considered the highest bidder. Rev. chap. 54. Nothing is found in this chapter, or in other statutes, taking from this franchise the character of property possessed by all other things over which men exercise dominion and ownership. The peculiar provision regulating the manner of its sale, upon execution, is designed to secure the continuance of the ferry for the public convenience, notwithstanding the transfer of the franchise thereby. No argument can be drawn from this provision in support of the decision of the court below.

It is argued that the grant of the franchise is made in view of the fitness and qualifications of the grantee, and involves a personal trust which cannot be assumed and exercised, in case of his death, by his representatives, because they may be unfit and unqualified therefor.

Hence, it is thought the death of the grantee terminates the franchise. The answer to this is, that, if the person exercising the franchise fails to perform the duties appertaining thereto, the license, by proper proceedings, may be revoked. Rev. § 1212. And that this position of appellee is not in accordance with the policy of our statutes is made very plain, by the provisions permitting and regulating the sales of the franchise upon execution. In such case the purchaser, by substitution, assumes the duties of the original grantee, and acquires all his rights. No reason can be given why the law will permit this, and yet prohibit the exercise of the franchise, in case of the death of the grantee, by his representatives. The doctrine contended for leads to another inconsistency, namely: the franchise may be subjected to the payment of the debts of the grantee in his life-time, but is not assets for the payment of the same debts after his death.

The grant of a ferry franchise is made for a specified time, not less than three nor more than ten years, with no reservation that it shall terminate upon the death of the grantee. Being, as we have seen, property, it would not, upon every analogy of the law, be lost by the death of the grantee. At common law it was granted as other real property, in estates for years, for life, or in perpetuity, and was so held. Under our statute it is granted in an estate for years only; and the death of the grantee can no more terminate it than the death of a tenant can terminate a like estate in lands.

The above hardship and injustice of the rule contended for, support a powerful argument against it. These franchises often require great outlays for boats, improvement of roads, etc., in order to render them remunerative to the owners, and useful to the public. The property thus acquired is valuable only in connection with the franchises; and, if they are forfeited by the death of the grantees, great loss and gross injustice would thus be wrought their estates.

The doctrine contended for by defendant's counsel is not supported by the authorities they cite, viz.: *Munroe v. Thomas*, 5 Cal. 470, and *Thomas v. Armstrong*, 7 id. 286.

These cases hold that ferry franchises are not the subjects of levy and sale under execution. The decisions appear to be based upon the grounds that a ferry franchise "involves a personal trust, granted by the sovereign, upon conditions imposed upon the grantee alone; and his liability cannot be removed by substitution." Such sales, as we have seen, are recognized by our statutes, and the ground of these decisions seems to be unsupported by reason and principles of law. The other authority cited (*Bowman v. Wathin*, 1 How. 189) does not appear applicable to the question involved in this case.

Reversed.

RYAN *et al.*, appellants, v. HARROW *et al.*

(37 Iowa, 494.)

Jury, drinking intoxicating liquors by.

The drinking of intoxicating liquors by jurors after they have retired to consider their verdict is such misconduct as will cause the verdict to be set aside.

APPEAL from Lucas district court.

This was an action of replevin. During the trial below, certain of the jury drank intoxicating liquors, and were alleged by plaintiffs to be intoxicated while deliberating upon the verdict. The verdict was for the defendants. Plaintiffs, upon the ground of the drinking and intoxication of the jurors, and other grounds, moved for a new trial. Motion denied and plaintiffs appeal.

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E. M. Thorp, Thos. F. Withrow and J. H. Penney, for appellants.

H. H. Trimble and Perry & Townsend, for appellees.

BROCK, J. The fact that, during the progress of the trial, and after the cause was submitted to the jury, and before they had agreed upon their verdict, two or more of the jury drank intoxicating liquors, seems to be conclusively established by the evidence embodied in the record. The liquors appear to have been procured by the jury without the knowledge or aid of any of the parties, none of whom are blamable for this misconduct of the jury in this respect. Whether any of the jury were intoxicated, is a question of doubt; several of the jurors, and the bailiff attending them, giving it as their opinion that one or two were under the influence of intoxicating liquors, while the persons thus charged, and several others, deny the fact. The view we take of the case will relieve us of the duty of determining whether the charge of intoxication is sustained by the record. And we are glad to escape so unpleasant an investigation, which might result in convincing us that the administration of the law in our state has been disgraced by the drunkenness of those appointed to decide, in a court of justice, upon the rights of their fellow citizens. We had hoped that such things were of the past, and would only be remembered as rare instances existing in the traditions of frontier days.

This court has ruled that a juror, separating from his fellows while considering of their verdict, and drinking ale or lager beer, without the charge that he became intoxicated, is misconduct requiring the verdict to be set aside. *State v. Baldy*, 17 Iowa, 39. The ruling of the court is based upon the fact of the drinking of the liquor by the juror, and no weight seems to be given to the fact of separation without permission. The authorities cited in support of this decision are *Brant v. Fowler*, 7 Cowen, 562, and *The People v. Douglass*, 4 id. 26, which are directly in point, and fully sustain the doctrine adopted by this court. It is urged, that these cases were, at the time of the decision of this court in *The State v. Baldy*, overruled by *Wilson v. Abrahams*, 1 Hill, 207, and the following cases, holding a contrary doctrine, are cited: *The State v. Sparrow*, 3 Murph. 487; *Pope & Jacobs v. State*, 36 Miss. 121; *Gilmanton v. Ham*, 38 N. H. 108; *Commonwealth v. Roby*, 12 Pick. 496. *Wilson v. Abrahams*, it may be admitted, does overrule *Brant*

v. *Fowler*, and *The People v. Douglass*. The other cases cited by defendants' counsel hardly go to the length and in the direction claimed for them. In *The State v. Sparrow*, refreshments, consisting of victuals and coffee, were handed into the jury room, and a vessel was found there containing some wine. There was no charge of intoxication as to any of the jury. In *Pope & Jacobs v. State*, at the suggestion of a fellow-juror, who was a physician, one of the jurors who was sick drank brandy, handed into the room for that purpose. No other juror drank of it. The court say: "If, indeed, the evidence closed with the proof of the naked fact that ardent spirits, in quantities sufficient to produce intoxication were conveyed by the officer into the jury room, we should feel no hesitation in holding that the conviction should be set aside." In *Gilmanton v. Ham*, one of the jurors took a small potion of brandy for sickness under which he was really suffering. It had been previously prescribed by his physician. The verdicts were sustained in all these cases. In *The Commonwealth v. Roby*, the jury were furnished crackers, cheese and cider; no improper conduct charged, or allegation that any one of the jury was intoxicated. The verdict was not set aside. Chief Justice SHAW, after examining the authorities touching the duty of the court in case of such misconduct of the jury, as the result of his observations, makes these remarks: "The result of the authorities is, that when there is an irregularity which may affect the impartiality of the proceeding, as when meat or drink, or other refreshments have been furnished by a party, or when the jury have been exposed to the effects of such influence, as when they have improperly separated themselves, or have had communication not authorized, then, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly and may have been corruptly done; or when the irregularity consists in doing *that which may disqualify the jurors for proper deliberation and exercise of their reason and judgment, as when ardent spirits are introduced*, then it would be proper to set aside the verdict, because no reliance can be placed upon its purity or correctness."

The following cases, not cited by defendants' counsel, favor a doctrine contrary to that recognized in *The State v. Baldy*. In *Davis v. The People*, 19 Ill. 74, the question is not discussed, and no authorities are cited; it is disposed of in less than four lines, and the con-

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duct of the officer in permitting the jury to drink intoxicating liquors pronounced very culpable, and, it is said, would have been properly punished by the court. In *Rowe v. The State*, 11 Humph. 496, the jury partook of intoxicating liquors during the trial, but not so as to disqualify them for a proper performance of their duty. In *Stone v. The State*, 4 id. 27, while the trial was in progress, the jury drank ardent spirits at their meals. There was no proof that they were disqualified thereby from duly considering the case. *Thompson's Case*, 8 Gratt. 637. Between the adjournment of the court in the evening and its meeting in the morning, the jury drank spirituous liquors "in moderation," in "the presence" of the sheriff, upon the invitation, as a mere "act of courtesy," of a witness for the commonwealth. In *Richardson v. Jones*, 1 Mo. 405, the jury had in their possession, and drank, intoxicating liquor, while considering their verdict.

In *Purinton v. Humphries*, 6 Greenl. 379, refreshments, with ardent spirits, were furnished the jury; but it is not intimated that any one of them was in the least degree intoxicated.

In *United States v. Gilbert*, 2 Sumn. 19, some of the jury drank ardent spirits during the trial, the prisoner's counsel consenting, in open court, that those whose health might require it should have this indulgence. See, also, *Coleman v. Moody*, 4 Henn. and Mumf. 1, and *State v. Upton*, 20 Mo. 397. In all these cases the verdicts were sustained.

In support of the doctrine of *The State v. Baldy*, the following cases may be cited, in addition to those referred to in the opinion in that case: *Leighton v. Sargent*, 11 Foster, 119; *State v. Bullard*, 16 N. H. 139; *Jones v. The State*, 13 Texas, 138; *Pelham v. Page*, 1 Eng. 535; *Grigg v. McDaniel*, 4 Harring. 367.

In *Leighton v. Sargent*, brandy, furnished by the attending officer, was drank by a juror complaining of illness. The quantity drank was small, and no suspicion was entertained of the intoxication of the juror. In *State v. Bullard*, it is not stated that the jurors were intoxicated, or under the influence of the liquor they drank; so in *Jones v. The State*, and in *Grigg v. McDaniel*. In *Pelham v. Page*, a portion of the jurors were intoxicated; but the court stated that the circulation of spirituous liquors among the jury, without proof of intoxication, while sitting in the trial of the case, even with consent of the parties, is good cause for setting aside the verdict. In all these cases the verdicts were set aside.

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In *Hogshead v. The State*, 6 Humph. 39, a juror who had appeared dull and abstracted during the progress of the trial, when he had retired with his fellows to consider their verdict, was threatened with *delirium tremens*. His physician testified, from his knowledge of the man, obtained in attendance upon him in attacks of like character, that he could not have understood intelligently the facts of the case. The juror, after taking a draught of spirits and breakfast, "seemed pretty well." A new trial was ordered.

In *The State v. Prescott*, 7 N. H. 296, a juror went to the bar and drank gin. There were other irregularities on the part of the juror, but this is dwelt upon, though it is not intimated that the juror was under the influence of liquor.

The verdict was set aside, but the question, whether the drinking of intoxicating liquor by a juror while considering the verdict is, alone, such misconduct as will require a new trial to be granted, is expressly waived.

In New York, the rule adopted by this court in *The State v. Baldy* seems to have been the received doctrine until *Wilson v. Abrahams*, 1 Hill, 207. That case overrules not only *Brant v. Fowler*, 7 Cow. 562, and *The People v. Douglass*, 4 id. 26, but also two other prior cases which recognize the rule, viz., *Bullard v. Spore*, 2 Cow. 430, and *Rose v. Smith*, 4 id. 17. Prior to any of these cases, however, it had been held, in the same state, that a verdict would not be set aside because, during a suspension of proceedings in a cause, the jurors drank spirituous liquors, furnished by both parties in the cause. *Dennison v. Collins*, 1 Cow. 111.

The foregoing are all the cases that have fallen under our notice which serve to elucidate the question under consideration. It must be admitted that they are very far from agreement, and cannot be reconciled. It may be said, however, that all admit that the drinking of intoxicating liquors by jurors, while in the discharge of their duties as such, is a very dangerous practice, that ought to be discouraged; it is uniformly condemned. All unite in holding, too, that, if it appear that a juror was under the influence of spirituous liquor while sitting in the case, the verdict cannot be sustained. The rule which this court adopted in *The State v. Baldy* is supported by reason, and will certainly tend to insure purity and correctness in the verdicts of juries, by removing the possibility of the effects of excessive indulgence in intoxicating drinks, admitted on all hands to be dangerous and evil. There is absolute safety in the rule; there

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is admitted danger without it. Prudence, and a desire to secure a pure administration of the law, demand that we adhere to it. It is in harmony with other rules intended to secure unbiased and dispassionate verdicts of juries, and is supported by precisely the same reasons.

If a juror has communications in regard to the cause with a party or an attorney therein; if he receives refreshments from a party to the suit, or is exposed to other temptations that might operate upon him to corrupt his verdict, the courts will not enter into an inquiry in order to determine whether, indeed, such was the result, but, in the fear of possible improper influences wrought thereby, will set aside the verdict. In such cases jurors of ordinary intelligence and integrity would not be influenced by these things, but the courts hold it far safer, and as more certainly conducing to the correct administration of justice, to remove temptation entirely out of the reach of jurors, than to weigh the temptations to which they may be exposed, and their ability to resist them, and thereupon to determine whether in fact the pure fountain of justice has been corrupted. Doubtless ardent spirits, to a certain amount, may be drank without inflaming the passions or beclouding the reason, but, beyond a certain limit, they indisputably produce these results. Where that limit is with different men cannot be certainly known. Courts will not assume to determine the limit, and whether, in case where jurors have indulged in the use of the dangerous liquid, it has been passed. Inasmuch as, in such a case, there can be no certainty of the purity and correctness of the verdict, that it is the result of cool and dispassionate deliberation and the honest exercise of reason, it will be set aside. In the business affairs of the country these very reasons often constrain those who employ men to discharge duties requiring coolness, deliberation and the calm exercise of judgment for their performance with safety to life and property, to impose strict abstinence from intoxicating beverages upon those so employed. Engineers upon railroad locomotives, pilots upon steamboats, etc., etc., are often the subjects of such restrictions, not because indulgence in intoxicating liquors, within the very indefinite bounds of what is called moderation, would absolutely unfit them for the careful discharge of their duties, but because there is absolute certainty of perfect safety from the maddening influence of alcohol in entire abstinence from the use of all the liquors in which it exists, and without such abstinence there can be no such safety.

BRONSON, J., in *Wilson v. Abrahams*, 1 Hill, 207, uses the following language: "If one of the jurors drank a glass of spirituous liquor while absent from court, I cannot think it a sufficient ground for setting aside the verdict, unless there is some reason to suppose that the juror drank to excess, or at the expense of, or on the invitation of, one of the parties. I agree that it would be well that all men should abstain from the using intoxicating drinks, but until that sentiment becomes nearly or quite universal, I think it should not be imposed as a law upon a juror in those cases where he is permitted, for a night or an hour, to go wheresoever he pleases, without being attended by an officer. * * *

"When there is reason to suspect that he has drank so much, at his own expense, as to unfit him for the proper discharge of his duty, the verdict ought not to stand."

These views ignore the very reasons of the rule which they attack, and put out of sight the acknowledged fact, that it is the only certain escape from danger to the purity of the verdict, from the use of intoxicating drinks. They require the court to determine the fact that these drinks have not been used to excess, from which expression, we infer, is meant to an extent that would not affect the mind and passions — a most difficult task, that might well puzzle a physiologist.

The just administration of the law ought not to rest on such uncertainties. The mere act of drinking at the expense of a party is given as a reason for setting aside the verdict. Yet the practical experience of all men teaches, that, ordinarily, the danger of improper influences over the juror from drinking, at the expense of a party to the suit, would not be as great as the danger of arousing his passions and beclouding his judgment by the drinking itself, even to an extent that would not be called excessive, but considered within the bounds of moderation. The argument, too, in the above extract, to the effect that the restraint ought not to be imposed upon jurors while the use of such beverages are free to others, is unsound. If the safe and correct administration of the law requires the rule, it is no argument against it that it will require jurors to submit to restraints not imposed upon others or themselves when not in discharge of the duties of jurors. That they may properly discharge those duties, they do in fact submit to many restraints.

We are well satisfied that the rule in *The State v. Baldy* is sustained by reason, and that it is in accordance with sound legal

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principles, and is not unsupported by authority, if, indeed, the weight of authority is not in accordance therewith.

The other question made upon the argument need not be considered, as, in our opinion, the verdict should have been set aside on account of the misconduct of the jurors in drinking intoxicating liquors after they retired to consider their verdict.

Reversed.

ALLEN, by his guardian, v. BERRYHILL, appellant.

(37 Iowa, 534.)

Contracts of insane persons not voidable by same party thereto.

Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence of the requisite capacity, or, for his protection, estops the other party to set up and sustain this objection.

APPEAL from Johnson district court.

The plaintiff, Isaac L. Allen, by his attorney in fact, R. D. Stephens, on the 26th day of June, 1866, agreed in writing to convey to the defendant Berryhill and one Downey lands and property in Montana, upon payment of two promissory notes, amounting to \$4,500, made by Berryhill and said Downey, payable, with two per cent interest, one year after date.

On the 4th day of February, 1867, Allen having become insane, R. D. Stephens was duly appointed his guardian, and, subsequent to his appointment, approved of the said agreement. At the time of commencing this action, the plaintiff was hopelessly insane.

The action was brought in equity, to enforce the payment of the notes, and also to obtain authority to make the conveyance agreed upon.

The defendant Berryhill, in his answer, among other things, by his eighth count, averred that the contract was still wholly executory, and that Allen was totally insane in fact when the same was made, and wholly incapacitated to enter into such contract, or authorize the same to be done, and that the same was without binding force or validity as to said Allen, or Stephens, or this defendant.

By his ninth count he averred that Downey was insolvent, the contract executory and joint, and that it should not be enforced.

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The plaintiff demurred to these two counts, as not containing facts sufficient to constitute a defense. The demurrer was sustained; from which defendant appeals.

Clark & Haddock, for appellant.

Edmonds & Ranson, for appellee.

DILLON, C. J. In substance, this action is one to recover judgment upon the notes made by the defendant to Allen. Incidentally, authority is asked to enable a deed of the property to be made when the purchase money shall be paid. It is not a case where the specific performance is sought, which rests in the discretion of the court to grant or refuse, according to circumstances.

The case should be regarded, and will be treated, in settling the law applicable to it, as if it were in form, as it is in substance, an ordinary action upon the notes.

The subject of the contracts of insane persons was recently before the court in the case of *Behrens v. McKenzie*, 23 Iowa, 333.

The general subject was quite fully examined at that time by the counsel who argued it, and by the court. It was remarked in the opinion delivered therein, that "the decided cases are far from being uniform on the subject of the liability or extent of liability of persons of unsound mind for acts and contracts done and made while in this condition. * * * The state of the law is such as to allow us to decide this case upon principle."

The conflicting and very unsatisfactory state of the authorities thus referred to is so fully exhibited in the separate opinion of our brother COLE (in whose conclusion, however, the other members of the court cannot concur), that it is not deemed necessary more particularly to refer to them in the present opinion.

The peculiarity of the case now under consideration consists in the fact that the representative of the party alleged to be insane, and with whom the contract was made, is the party seeking to have it enforced. It is the *same party* to the contract that makes defense, and the defense is, that the other party to the contract was totally insane at the time it was entered into.

No such case, that is, no case where it was the sane party who set up as a defense that his adversary was insane, was referred to by counsel, nor is any such referred to among all those which have been so industriously and carefully collected by Mr. Justice COLE.

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This circumstance is regarded as important, and as distinguishing the case from those in which it is the insane party who pleads his incapacity, and seeks to prevent the sane party to the contract from enforcing it against him.

It is the opinion of the court, that justice and sound policy concur in requiring it to hold, as it does, that where a contract has been entered into (under circumstances which would ordinarily make it binding) by a sane person with one who is insane, and that contract has been adopted and is sought to be enforced by the representatives of the latter, it is no defense to the sane party merely to show that the other party was *non compos mentis* at the time the contract was made.

There are obvious reasons, founded on the justice and propriety of protecting those whom the visitations of Providence have incapacitated from protecting themselves, against contracts which are discovered to be prejudicial to their interests.

Their incapacity to contract is a shield which the law places in their own hands to protect them; not a sword in the hands of others with which to cut down their rights.

If a person who is of unsound mind, or who is afterward shown to have been of unsound mind, shall chance to make a contract which is really advantageous to him, can a satisfactory reason be given why he should not have the right to enforce it?

No such reason occurs to us.

The reason advanced by the appellant is, that, in law, two minds must concur to make a contract; that, where one of the parties is insane, there are not two minds capable of contracting; hence, there is, and can be, no contract, and, therefore, no liability by either party to the other thereon.

It cannot be denied that there is, to the legal mind, prone to draw, and often delighting to indulge in, refined and acute distinctions, much that is plausible in the ground here assumed. But, after all, is that ground really tenable?

As applied to this case, the defendant says to the plaintiff: "You cannot recover, because you have no contract." The plaintiff replies: "But I have a contract; here it is; it consists in your own notes." Now, what does the defendant rejoin? "I admit you have my notes, but, though signed by me, they are not, in legal contemplation, my act, because you had no power to agree to take them."

Is this rejoinder not subtle, rather than substantial? In fact, the

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plaintiff has the promise or contract of the defendant, and, if fairly obtained, it ought to be no defense to a sane defendant that the plaintiff's mind was not sound at the time the contract was made.

The objection relied on by the defendant is one of the many difficulties which have arisen out of the use of the words "void" and "voidable," and the uncertain extent of meaning attached to them.

The conclusion which we reach derives a very strong support in the analogies of the law. Thus, if an infant make a contract with one of full age, it may, as is well known, be enforced by the infant against the adult, but not by the adult against the infant, if the latter pleads (and the plea is purely personal) his disability.

So, also, the same doctrine applies to the disability of coverture. And this court has decided, that while, as a general rule, it is true that the discharge of a principal releases a surety, yet it holds, that, "where a person *sui juris* becomes surety for a married woman, a minor, or other person incapable of contracting," the surety is bound, notwithstanding a successful plea of disability on the part of the principal. *Jones v. Crosthwaite*, 17 Iowa, 393, 396, and cases cited.

Another illustration: Delivery is essential to a deed, and acceptance essential to delivery, and there can be no acceptance without mental assent. This is a general rule of law; and yet a deed made to an infant, or to a lunatic, although there be no mental capacity capable of understanding the nature of the instrument, is valid. The law supplies or presumes the requisite assent to an act beneficial to the party; or it dispenses with it.

So here. Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence of the requisite capacity, or, for his protection, estops the other party to set up and sustain this objection. The subject might be further elaborated, but it is scarcely needful to do so.

It is the opinion of the majority of the court, that the eighth count of the answer pleaded no sufficient defense; and this conclusion is strengthened by the consideration that it is not alleged therein that the incapacity of Allen was unknown to the defendant at the time the contract was made. If the contract was made by the defendant with knowledge of Allen's situation, his claim to make this defense is thereby weakened.

The allegation of Downey's insolvency is no defense to the present action. This is so obvious as not to require any special notice.

Affirmed.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

CABOT, appellant, v. CHRISTIE.

(43 Vt. 121.)

Sale of lands—parol warranty—false representations as to quantity

Parol evidence is not admissible to prove a warranty of the quantity : and conveyed by deed.

Where a vendor of land, with intent to induce the sale, makes representations as to the quantity, *as of his own knowledge*, and the vendee is thereby induced to purchase, the vendor is liable for any damage which the vendee may sustain by reason of a deficiency in the quantity as represented, although such representations are believed to be true by the vendor when made.

Action: for false warranty in sale of a farm. At the trial the plaintiff introduced evidence to the effect that the defendant had made representations in respect to the number of acres contained in the farm, as of his own knowledge, with the intent to induce the plaintiff to believe that there were one hundred and thirty acres of land; that the plaintiff, relying on these representations, made the purchase, and that there were, in fact, only about one hundred and seventeen acres. The defendant's evidence tended to show that he did not make, or profess to make, such representations as of his own knowledge, but that he at the time believed that the farm contained one hundred and thirty acres. The farm was sold entire, and not by the acre. The jury returned a verdict for the defendant. The plaintiff, having excepted to certain parts of the charge of the court to the jury, which are sufficiently stated in the opinion, brought this appeal.

Norman Paul and Washburn & Marsh, for plaintiff.

W. C. French, for defendant, to the point that fraud in this class of actions consists in representing what the seller knows is not true to induce the purchaser to purchase, cited *Pasley v. Freeman*, 3 T. R. 51; 2 Kent's Com. 489; 1 Par. on Con. 460; *Beeman v. Buck*, 3 Vt. 53; *West v. Emery*, 17 id. 583; *Parlin v. Bundy*, 18 id. 582; *Paddock v. Strobbridge*, 29 id. 470; *Culver v. Avery*, 7 Wend. 380, 386; *Early v. Grant*, 9 Barn. & Cres. 926.

STEELE, J. I. The plaintiff cannot recover upon the ground of a parol warranty of the quantity of the land. If the quantity was warranted it should be provable by the deed. It is true that a deed of conveyance need not contain all the stipulations of the parties. For example, the agreements as to consideration and mode of payment need not be embraced in the deed, for the instrument purports to be the deed of but one of the parties. But it does purport to contain the covenants of the grantor with respect to the property conveyed. To add a new covenant by parol proof would be a palpable violation of the familiar rule that written contracts are not to be varied by oral testimony. Such a parol stipulation, it has been held, could not be proved in respect to an ordinary bill of sale of personal property.

Nor is the plaintiff entitled to recover in this action upon the ground of mistake. A mutual and material mistake, by which the purchaser was misled as to the quantity of land, would be a more appropriate ground for relief in a court of chancery than in a court of law.

If, then, the plaintiff was entitled to recover at all in this case, it was by reason of some fraud on the part of the defendant by which the bargain was induced.

II. The plaintiff complains of the ruling of the county court upon the subject of fraud. It is conceded that the quantity of land was represented incorrectly. The court properly told the jury that this, in itself, would not amount to fraud. To entitle the plaintiff to a recovery upon that ground, the defendant must have made some representation upon the subject that he did not believe to be true. The plaintiff claims, and his evidence tended to prove, that the defendant did make such a representation, by stating the quantity of land as a matter within his own knowledge when, in fact, as the

defendant concedes, it was a matter upon which he had only a belief. We think it very clear that a party may be guilty of fraud by stating his belief as knowledge. Upon a statement of the defendant's mere belief, judgment or information, the plaintiff might have regarded it prudent to procure a measurement of the land before completing his purchase. A statement, as of knowledge, if believed, would make a survey or measurement seem unnecessary. A representation of a fact, *as of the party's own knowledge*, if it prove false, is, unless explained, inferred to be *willfully* false, and made with an intent to deceive, at least in respect to the knowledge which is professed. A sufficient explanation, however, sometimes arises from the nature of the subject itself, or from the situation of the parties being such that the statement of knowledge could only be understood as an expression of strong belief or opinion. But the quantity of land in a farm is a matter upon which accurate or approximately accurate knowledge is not at all impossible or unusual. If the defendant had only a belief or opinion as to the quantity of land, it was an imposition upon the plaintiff to pass off such belief as knowledge. So, too, if he made an absolute representation as to the quantity, which was understood, and intended to be understood, as a statement upon knowledge, it is precisely the same as if he had distinctly and in terms professed to have knowledge as to the fact. It is often said that a representation is not fraudulent if the party who makes it believes it to be true. But a party who is aware that he has only an opinion how a fact is, *and represents that opinion as knowledge*, does not believe his representation to be true. As is well said in a note to the report of the case of *Taylor v. Ashton*, 11 Mees. & Wels. 418 (Phila. ed.), the belief of a party, to be an excuse for a false representation, must be "a belief in the representation as made. The *scienter* will, therefore, be sufficiently established by showing that the assertion was made as of the defendant's own knowledge, and not as mere matter of opinion with regard to facts of which he was aware that he had no such knowledge." The same principle of law has been repeatedly recognized. *Hammatt v. Emerson*, 27 Me. 308, 326; *Bennett v. Judson*, 21 N. Y. 238; *Stone v. Denny*, 4 Met. 151; *Hazard v. Irwin*, 18 Pick. 95.

In the case before us, the plaintiff, under the charge of the court, was denied the benefit of this rule of law, although there was evidence tending to show every necessary element of a fraud of the nature we have been considering. The plaintiff's request was refused

and the jury were instructed that the plaintiff could only recover in case they found "that the defendant represented the quantity of land different from what he knew or believed to be true." Under these instructions, it would be immaterial whether he made the representation as a matter of knowledge or as a matter of opinion, so long as he kept within his *belief as to the quantity of land*. In this we think there was error. The court properly instructed the jury, that the representation, to warrant a recovery, must have been relied on, and have been an inducement to the purchase. The subsequent remark, that the jury, to hold the defendant, must find that the plaintiff would not have made the purchase but for the representation, we regard as probably inadvertent.

What the plaintiff would have done, but for the false representation, is often a mere speculative inquiry, and is not the test of the plaintiff's right. If the false representations were material and relied upon, and were intended to operate, and did operate, as one of the inducements to the trade, it is not necessary to inquire whether the plaintiff would or would not have made the purchase without this inducement.

The judgment of the county court is reversed, and the cause is remanded.

CLOSSON v. STAPLES, appellant.

(43 Vt. 209.)

Malicious prosecution of civil suit.

Where a civil suit is commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant, in an action for the damages sustained by him in the defense of that original suit, in excess of taxable costs obtained by him; and, to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment or by summons only.

This was an action on the case for the malicious prosecution of a civil suit. The declaration set forth, in substance, that the plaintiff signed a certain promissory note as surety for one Kellogg, payable to Staples, which was paid at maturity, but not delivered up, under

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the pretense that it was lost, etc. Kellogg having afterward died, Staples produced the note, claimed that it had not been paid, and demanded payment of this plaintiff. Payment being refused, Staples procured one Burnham to take the note and commence suit thereon against this plaintiff. Said suit was commenced by an attachment of plaintiff's property. Judgment was rendered in that suit against Burnham for costs, but, the latter being worthless, the costs were never paid. Also that the whole proceeding against plaintiff was the willful and malicious act of the defendant, with intent to injure, etc., by means of which acts the plaintiff had been put to great trouble and expense in looking up witnesses, preparing for his defense, etc.

The jury, under the charge of the judge, found a verdict for the plaintiff, and the defendant brought this appeal.

J. A. Wing and *Paul Dillingham*, for defendant, cited, to the point that an action for malicious prosecution of a civil suit could not be maintained, unless there was an arrest of the person or excessive attachment of property, 1 Sw. Dig. 493; 1 Salk. 14; Esp. Dig. 525; 2 Ch. Pl. 600, note R; 1 B. & P. 205; 10 Johns. 106; *Ray v. Law*, 1 Pet. C. C. 207; 7 Eng. Law and Eq. 475; 12 Eng. Com. Law, 235; *Hathaway v. Allen*, Brayton, 152.

Redfield & Gleason, for plaintiff.

WILSON, J. This is an action on the case for malicious prosecution of a civil suit; and the first question is, whether the court erred in their refusal to charge the jury as requested by the defendant. The case states that the plaintiff introduced testimony tending to prove all the allegations of his declaration, and the necessary facts to entitle him to recover, except it was not proved that the plaintiff in this suit was arrested, or any property attached on the writ in the suit mentioned in the declaration, which Staples caused to be prosecuted in Orange county; "but it was served on Closson only by the officer delivering him a copy." The defendant requested the court to charge the jury, that the action could not be maintained without proof that Closson was arrested, or his property attached, in that original suit. This leads us to consider whether an action for malicious prosecution of a civil suit, without reasonable or probable cause, will lie where the process in the suit so maliciously

prosecuted is by summons only. In England, before the statute of Marlbridge, no costs were recoverable in civil actions. It seems, that, before the statutes entitling the defendant in civil actions to costs, if the suit terminated in his favor, he might support an action at common law against the plaintiff, if the proceeding was malicious and without probable cause. Co. Litt. 161; 3 Lev. 210; Hob. 266; 3 Chitty's Bla. 125. But, in England, since the statutes which give costs to the defendant in all actions in case of a nonsuit or verdict against the plaintiff, and in other stages of the cause, it seems that no action can be maintained merely in respect of a civil suit maliciously instituted, except in some cases under legislative provisions, and, perhaps, excepting cases where the defendant failed to obtain the ordinary costs, owing to the insolvency of a third party in whose name the suit was prosecuted. It is said that those statutes give costs to successful defendants by way of damages against the plaintiff *pro falso clamore*. It is said by Judge Swift, in his Digest, vol. 1, p. 492: "It is well settled, that, at common law, no action will lie against one for bringing a civil suit, however malicious and unfounded, unless the body of the party is arrested and imprisoned or holden to bail; in all other cases, the costs the party recovers are supposed to be an adequate compensation for the damage he sustains." There does not appear to be any conflict in the authorities, that, where any thing is done maliciously, besides commencing and prosecuting a malicious or vexatious action, a suit for the damages sustained by such act may be maintained. It is upon this ground that an action is sustainable for a malicious arrest, or holding to bail for too large a sum, and for maliciously suing out and levying a writ of *fieri facias*. 1 Lev. 275; 2 Wils. 305. Upon the same principle, it has been held that an action may be maintained where the property of a party has been maliciously attached upon mesne process. Hob. 205, 266; *Gifford v. Woodgate*, 11 East; *Wills v. Noyes*, 12 Pick. 324. It is said, in some of the cases, that, where the process in the malicious and unfounded suit is by attachment, an action will lie for the damage the party sustains, because, in such case, no cost is allowed which can be a compensation for the personal injury. But we think the fundamental principles and analogies of the common law, as laid down by the text-writers and early decisions of the English courts, do not make the manner in which service of the process was made essential to maintain the action. The common law declares, that for every injury there is a remedy. The principle

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thus enunciated, as applicable to this class of cases, has been illustrated by some of the most eminent jurists, whose views of the subject are entitled to great weight. In *Watson v. Freeman*, Hob. 205, it is said, "If a man sue me in a civil suit, yet if his suit be utterly without ground, and that certainly known to himself, I may have an action against him for the damage he putteth me unto by his ill practice." Again, it is said in 2 Selw. N. P. 1054, by a learned writer upon this subject, that, "whatever engines of the law malice may employ to compass its evil designs against innocent and undefending persons, whether in the shape of an indictment or information, which charge a party with crimes injurious to his fame and reputation, and tend to deprive him of his liberty, or whether such malice is evidenced by malicious arrests, or by exhibiting groundless accusations merely with a view to occasion expense to the party who is under the necessity of defending himself against them, the action on the case affords an adequate remedy to the party injured." In *Elsie v. Smith* it is said, that, "if a party falsely and maliciously, and without probable cause, put the law in motion, that is properly a subject of an action on the case." 2 Chitty Eng. Eccl. 345. The principle above cited is the same which sanctions the well-known actions for malicious prosecutions in which no costs are taxed in favor of the accused party, and furnishes remedies by actions on the case for the abuse of legal process. 2 Saund. Pl. and Ev. 651, and notes.

The case of *Cotterell v. Jones*, 7 Eng. Law and Eq. 475, has been much relied upon by the defendant. In that case there was no arrest of the body nor attachment of property. The only injury alleged was, that the plaintiff was unable to obtain the costs in the suit complained of, owing to the insolvency of Osborne, in whose name Jones prosecuted the suit maliciously and without probable cause, and it was to recover the ordinary costs that the suit was brought by Cotterell against Jones. The court held the declaration insufficient in arrest of judgment, inasmuch as it was consistent with the declaration that no ordinary costs were awarded to the plaintiff on the nonsuit, owing to his own neglect to apply for them, and that this was the only reason of his failing to obtain them. The court did not decide whether, if the declaration averred the recovery of costs in the action by the defendant in the suit complained of, and those costs had not been obtained by him, by reason of the insolvency of Osborne, that would have been a sufficient

statement of legal damage; because there was in that case no sufficient averment that the plaintiff ever gained a legal right to costs, and no averment that any costs to which he had a right were not obtained by him, owing to the insolvency of Osborne. The decision in that case was put upon the ground that the declaration contained no averment of legal damage. But, in that case, WILLIAMS, J., says: "If such an action be brought and prosecuted maliciously and without reasonable or probable cause, I think there is no doubt an action will lie for it, provided legal damage have been sustained."

In the case of *Whipple v. Fuller*, 11 Conn. 581, the court held, that, if an action be brought and prosecuted maliciously and without probable cause, by which the party so prosecuted in a civil suit suffer damage, this action will lie, though neither his body was arrested nor his property attached. The declaration in the case of *Fuller v. Whipple*, which was reviewed on writ of error in the case of *Whipple v. Fuller* above cited, contains two counts: one founded upon the statute of that state, to prevent vexatious suits; and the other is a count at common law for the malicious prosecution of a vexatious and malicious suit without probable cause. The process was served by attaching the property of the defendant Fuller; the action was entered in court, and at a subsequent term the plaintiff in that action was nonsuited, and the defendant recovered judgment for his costs. The count at common law contained, among other things, an averment that the plaintiff by means of the premises was compelled to expend large sums of money in his defense for counsel and witness fees, and for his own time and expenses. In that case the court, after reviewing the English authorities upon the subject, says: "But we wish to place our decision of this question upon broader principles—principles which we believe have received the sanction of the common law in its earliest ages." It was held in that case that the count at common law was sustainable upon the fundamental principles and analogies of the common law, aside from the averment that the plaintiff's property was maliciously attached.

The early English cases show very clearly, that, before the statutes entitling defendants to costs existed, they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause. It would seem, however, from more recent decisions, that the present English rule, which restricts or limits the right of action for maliciously prosecuting civil suits

without probable cause, stands mainly upon the ground that the costs, which the statute provides the successful defendant shall recover, are an adequate compensation for the damages he sustains, but under their rule it does not appear that the right of action is restricted to those cases where the process is by attachment. The justice or equity of the English rule, as a part of their system of jurisprudence, there is no occasion to consider. But in our own state, not only the mode of process in civil actions, but also the general provisions of our statute for taxing costs to the defendant when the suit terminates in his favor, are opposed to making it essential, to sustain an action for the malicious prosecution of a civil suit without probable cause, that his body was arrested or his property attached. Chapter thirty-three of the general statutes provides that the ordinary mode of process in civil causes in the several courts in this state shall be by writ of summons or attachment. Writs of attachment may issue against the property of the defendant, and in certain cases against his body. The service of the process, whether it be by arresting the body of the defendant, attaching his property, or by delivering him a copy only, is equally effective at the commencement of the action, and the defendant is under the necessity of defending himself against the suit, or suffer the consequences of allowing judgment against him by default. Since arrest upon mesne process, in actions in form *ex contractu*, except in certain cases, was abolished in this state by the statute of 1839, there have been but few cases where such process has been served by arresting the body of the debtor and holding him to bail, or imprisoning him for want of bail, and generally defendants are able to procure the bail required by the statute, and the damage sustained by that mode of service is merely nominal. And so, too, where the process is served by attachment of property, the defendant is generally allowed to receipt the property so attached, and very seldom sustains any damage by that mode of service.

In general it is of no special importance to the defendant whether the process is by attachment or summons; but the undue vexation, costs and other expenses in defending a malicious and unfounded suit, accrue after the process is served and entered in court. The damages sustained by the defendant in defending such suit can be no less where the process is by summons than where it is by arrest of the body, or attachment of property. They are, for the most part, for counsel and witness fees, for time and expenses in preparing

the suit and attending court, and such other damages as are the direct consequence to the defendant by reason of having been compelled to defend a suit maliciously prosecuted by the plaintiff, without probable cause. Service of the process by arresting the body or attaching property might be made under circumstances by which the damages occasioned by the suit would be enhanced, but such mode of service is not essential to maintain an action for damage where damage is sustained in the suit complained of, after it is entered in court. Under our statute, which gives the right to commence any civil suit by summons, it would not do to hold that an action, for maliciously prosecuting a civil suit commenced by summons without probable cause, could not be sustained; for if such a rule were adopted, it would not only encourage malicious and groundless suits, but also afford full protection and indemnity against liability for the damage to the defendant, caused by the suit so maliciously instituted against him, in all cases where the process in such suit was by summons only. The principle of the common law, recognized by the English courts before the statutes allowing costs to defendants, and which gave a remedy for injuries sustained by reason of suits which were malicious and without probable cause, is and ought to be operative still, and we think it affords a remedy in all such cases where the taxation of costs is not an adequate compensation for the damage sustained. Our statute provides that no writ of summons or attachment, requiring any person to appear and answer before any court in this state, shall be issued unless there be sufficient security given to the defendant that the plaintiff shall prosecute his writ to effect, "and shall answer all damages if judgment be rendered against him." The above quoted words, "*and shall answer all damages if judgment be rendered against him,*" have reference solely to the taxable costs established by law, and without any regard to the manner in which the suit is commenced, whether by attachment or summons. And the power of the court, at any time during the pendency of the action, to order additional or better bail to be entered to the defendant for costs, and to compel the plaintiff to become nonsuit for neglect to comply with such order, has reference to, and is limited by, the taxable costs which the defendant is entitled to recover if judgment be rendered in his favor. Our statute, by which the prevailing party recovers certain costs incurred in the prosecution or defense of a civil action, stands upon the ground that certain claims and rights in respect to the

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matters in issue are asserted, that in the adjudication of which - civil action, when brought and prosecuted in good faith, is a claim of right, and in order to place the administration of the law upon reasonable grounds in respect to the rights asserted and recoverable costs, the expenses of litigating the claims of the parties, over and above certain items of costs which the statute allows the prevailing party to recover, should be borne by the respective parties by whom such expenses are incurred, without regard to the result of the suit. But the system of taxing costs under our statute, except in a very few cases, was enacted with reference to suits brought and prosecuted in good faith. In suits so brought and prosecuted, the defendant may be subjected, or he may subject himself, to expenses not recoverable, even if the suit terminates in his favor; but of this he has no legal ground to complain when the suit is brought and prosecuted in good faith, because it is the ordinary and natural consequence of a uniform and well regulated system, to which all parties in civil actions are required to conform. But where the action is brought and prosecuted maliciously and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such case the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff in such case has no legal or equitable right to claim that the rule of law, which allows a suit to be brought and prosecuted in good faith, without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs only, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But where the damages, sustained by the defendant in defending a suit maliciously prosecuted without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action on the case.

It is apparent, from our statute regulating the taxation of costs, that the costs allowed the successful defendant, where the suit is brought and prosecuted in good faith, were not intended or supposed to be an adequate compensation for all damages he might sustain and should recover by reason of defending a suit which was brought and prosecuted maliciously and without probable cause. It would be inconsistent with our system of jurisprudence, in the legitimate use of legal process, to allow in all cases such

costs as would cover all damages the defendant might sustain by defending a suit, without regard to the motive which influenced the plaintiff in commencing and prosecuting it. And it is quite obvious, I think, that a provision by law, by which the court would have discretionary power to tax and allow the defendant to recover, in a malicious and unfounded suit, such costs by way of damages sustained in the defense of the suit as in their judgment he was entitled to, could not be made without infringing the rights of the plaintiff in such action, because he would have the right of trial by jury of the question, whether, in the prosecution of the suit in which such costs were to be taxed, malice and the want of probable cause concurred, and this question could not be tried in that original suit.

We are of opinion, that, where a civil suit is commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defense of that original suit, in excess of the taxable costs obtained by him; and, to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment or by summons only.

2. It is insisted by the defendant's counsel that that part of the charge on the question of malice, in which the court told the jury they might infer malice from the want of probable cause, is erroneous. The case shows that the court charged the jury, among other things on the question of malice, that it was generally to a considerable extent a matter of inference to be drawn from the circumstances proved in the case; that the jury might or might not infer malice from want of probable cause; that it was for the jury to say, upon the whole evidence bearing upon this point, whether the defendant Staples in prosecuting that suit acted maliciously or not. We think the charge was correct on this point. It has been repeatedly decided, that from proof of the want of probable cause malice may be implied, and the want of probable cause may be so strong and plain as to amount to evidence of malice. *Pangburn v. Bull*, 1 Wend. 345; 9 East, 361, 362, 368; 1 Am. Lead. Cas. 211, 218.

The court very properly told the jury that the burden of proof was on the plaintiff to prove a want of probable cause for commencing and prosecuting the suit in Orange county, and that it could not be inferred from malice. The question of malice was a question

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of fact for the jury, and it was submitted to them to find upon the whole evidence whether Staples, in prosecuting that suit, acted maliciously. From the charge we think the jury did not understand that the question of malice was to be treated as a mere inference from the want of probable cause, but a question for them to determine upon the whole evidence in the case.

(The remainder of the opinion relates to questions of practice).

Judgment affirmed.

TROY AND BOSTON RAILROAD COMPANY, appellant, v. POTTER.

(43 Vt. 285.)

Railroad — failure to record survey — right to exclusive possession.

Where a land owner agrees with a railroad company upon the compensation to be made for lands over which the road is laid, and permits the company to take possession of the land and construct their road thereon, it is too late for him to take advantage of the omission of the company to record the survey, as required by its charter.

The owner of the land adjoining a railroad, and from whom the land was taken for the construction and use of the road, under the power conferred by the charter, has no right to enter upon the land after it is so taken, and while it is being so used, and cut and take therefrom the herbage and other products of the soil growing thereon.

ACTION of trespass on the freehold. The facts are stated in the opinion.

At the trial, the court directed the jury, *pro forma*, to return a verdict for the defendant; to which the plaintiff excepted.

E. J. Phelps, for plaintiffs.

G. W. Harmon, for defendant.

PIERPONT, C. J. This is an action of trespass on the freehold, brought to recover the damage sustained by the plaintiffs in consequence of the defendant's entering upon the line of the Southern Vermont Railroad, of which the plaintiffs are the lessees, where said road crosses the farm of the defendant, and cutting and taking away the grass growing upon the said road, and within the lines and

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fences thereof; the plaintiffs being, at the time, in possession, and using the same for the purposes for which it was constructed; the object of the suit being to test the right of the defendant so to do.

The defendant claims the right to enter upon the premises in question, and to cut and take off the herbage, on the ground that, after the said road had been surveyed, and the lines thereof staked out and established across the defendant's farm, in settling the question of land damages between himself and the company, it was agreed and understood that he was to have such right; and that he understood, at the time, that this right was taken into consideration in fixing the amount of such damages. And, in aid of this claim, the counsel of the defendant insists that said corporation, in taking the land under their charter, did not cause a certificate of the survey of said road to be recorded in the town clerk's office in the town where the land lies, as required by said charter, and, for that reason, they got no title or right in the land in question, except such as they acquired by virtue of the contract between them and himself.

It appears, from the bill of exceptions, that it was agreed by the parties, upon the trial, that a copy of the survey of the route or line of the Southern Vermont Railroad Company, in the town of Pownal, as recorded in the office of the town clerk of that town, should be treated as evidence introduced by the plaintiffs, subject to all legal objections, and the same referred to. No question appears to have been made in the county court in respect to the survey or its record, but the trial proceeded to judgment upon the supposition that the survey was duly recorded, and a copy of the record in evidence; and, as no question arose upon it, there was no occasion to attach a copy thereof to the case as made up for this court. We cannot, therefore, assume that no such record exists, but must take the case as it is made up, which shows that a copy of the record was there treated as in the case, and so it must be regarded here.

But, suppose no record of the survey of the road was in fact made, as required by the charter: would that preclude the plaintiffs recovering in this case? It appears that the road was, in fact, surveyed, located, and its limits clearly defined across the land of the defendant by the corporation, and of this the defendant had full knowledge at the time. He was, in fact, then the president of the corporation. With a full knowledge of all the facts, he proceeds to arrange with the company as to the damages for the land so taken; and, having satisfactorily fixed the amount, he receives the sum agreed upon.

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He permits the company to enter upon and take possession of it, and construct their railroad over it. Now, if we say that the plaintiffs cannot recover in consequence of the neglect to record the survey alone, it must be on the ground that the company acquired no rights whatever in their road across the defendant's premises, and that the defendant now has the right to enter upon it, and take the entire and exclusive possession of it. This, we think, will hardly be claimed.

The survey and location of the road is what constitutes the taking of the land over which it is laid; and, when so taken, it is the duty of the company to cause a certificate of the survey to be recorded, and to pay the damages to the land owner before they take possession. If, however, the land owner, as in this case, agrees upon his compensation, and permits the company to take possession of the land and construct their road thereon, we think it is then too late for the land owner to take advantage of the omission by the company in these respects.

There is another reason, we think, why the defendant cannot avail himself of this objection. He was, at the time, the president of the company. As such, it was his duty to see that the survey was recorded. To allow him now to take advantage of the omission to make such record would be to permit him to take advantage of his own wrong, to the prejudice of the company that he was bound faithfully to serve.

We think this case is to be governed by the same principles that are applicable in all cases where the land is taken by a railroad company, a survey made and duly recorded, as required by the charter.

It is further claimed by the defendant, that the right of the plaintiffs to recover is affected by the agreement between the defendant and the committee appointed by the company to settle the land damages on the line of the road, by which he reserved the herbage and all that grew upon the land outside of the track of the road; and he says: "I considered that this reservation was taken into account in fixing my land damages."

It may be observed, that, in this arrangement, neither party was contracting for the land, and this agreement had no reference to its transfer by the defendant to the company. The company did not take the land by purchase, in the ordinary acceptation of that term, but took it by survey and location, under and according to the power and authority conferred by their charter. There is no quali-

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lication or limitation in respect to what they take; the extent of the acquisition is determined only by the power to take, given by the act of incorporation. The defendant had no power to impose restrictions or make reservations. When the company had so taken the land, they had obtained all the title to it they could acquire, subject to the payment of the damages to the owner. If the company had the power to take from the defendant the right to enter upon the land so taken, and cut and take away what was growing thereon, then they had taken it, and no attempt to make a *reservation* by the defendant, as he states, would be of any avail.

If, then, the defendant obtained any rights by virtue of what transpired between him and the committee of land damages, such rights depend solely upon that agreement, without aid from the fact that the land was taken from the defendant, the same as if the agreement had been made with a party not an adjoining land owner. We think the most that can be claimed for the defendant is a verbal agreement, between him and the company, that he may enter, and cut and take away what grew on the land outside of the track of the road. What would be the effect of such an agreement in a case like the present, between the company and the defendant, it is not necessary now to inquire. As it seems very clear that the present plaintiffs, having purchased the entire rights of the company in this road, and taken a lease thereof for all time, without any knowledge of the existence of any such agreement, or any thing to indicate its existence, so as to put them upon inquiry, but finding the company in full possession up to the time of the lease they cannot be affected by the existence of any such agreement. This brings us to the consideration of a more important question, one that affects not only the parties to this controversy, but, to a greater or less extent, probably, all the railroad corporations and operators, and the land owners adjoining railroads, in this state, namely: Has the owner of the land adjoining the road, and from whom the land was taken by the railroad company, for the construction and legitimate use of the road, under the power conferred by their charter, the right, at will, to enter upon the land, after it is so taken, and while it is being so used, and cut and take therefrom the herbage and other products of the soil growing thereon? This question is often referred to in the books, in the discussion of questions of a somewhat similar character, but I am not aware that this precise question has been decided — it certainly has not in this state — but I think the incli-

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nation of judges, and legal writers is strongly toward the opinion that those who control, manage and operate the railroads in the country should have the full and exclusive possession and control of the land taken, for the legitimate use of the road, within the lines thereof, and embraced within the fences that, by the laws of this state, the railroads are required to keep upon the sides of their road. Although the right of the railroad company is but an easement, and not a fee, this does not preclude their having the sole and exclusive possession of the land while in the exercise of that easement. The fact that, upon the abandonment or surrender of their road and charter, the land would revert to the former owner, does not curtail their right to its exclusive use, if necessary. It is said by REDFIELD, C. J., in *Jackson v. Rut. & Bur. R. R. Co.*, 25 Vt. 150, "that the railway company must, from the very nature of their operations, in order to the security of their passengers, workmen, and the enjoyment of the road, have, at all times, the right to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners, in any mode and for any purpose." He says, further, "that as to the right of the former owners to the herbage growing on the land, or to dig up the soil and subsoil, it is not necessary here to consider." He also says, that "it is obvious that the right of the railway to the exclusive occupancy must be for all the purposes of the road, much the same as that of an owner in fee." Although this question was not distinctly before the court in that case, still it stands as the deliberately expressed opinion of an eminent judge and jurist, and one specially learned in the law of railways, and, as such, the opinion is entitled to great weight. As to the right of the adjoining land owner to enter and dig up the turf, the question was distinctly before this court in the case of the *Conn. & Pass. Riv. R. R. Co. v. Holton*, 32 Vt. 43, and it was there expressly decided that the land owner had no right to enter for that purpose. In delivering the opinion in that case, Judge ALDIS cites approvingly the language of Judge Redfield above referred to, and then proceeds as follows: "Without stopping to inquire whether a possible case may not exist where the land owner might enter to obtain mines or minerals, or to take herbage or other vegetable growth, it is obvious that the possession of the railroad company must, ordinarily and practically, be absolute and exclusive. Hence, any entry by the land owner, or any act done by him upon the land, which tends in the least to impair the structure of the

road, to endanger the running of trains, to lessen the safety or comfort of passengers, or generally to embarrass the use of the road for the purposes for which it was built, must be deemed wrongful." The principle involved in that case is substantially the same as that in the present, and it is not easy to make a material distinction between the two. It is true, there are some objections to the act done in one case, that do not exist in the other. The annoyance from dust, occasioned by removing the turf, would not result from cutting the herbage, but the instance in which the land owner would wish to remove the turf would be rare, if the right were conceded; but if the right to remove the herbage be conceded, a large part of the adjoining land owners throughout the state would be found, at the proper season, within the lines of the roads, with their hired men, tools, and perhaps teams, for the purpose of taking off the herbage, and the detriment to the railroad company, and the danger to trains and passengers, would be increased a thousand fold in the latter case beyond that in the former. The men employed by the land owners would be likely to be careless, both in respect to being upon the track in person, and temporarily laying their tools thereon, from which accidents might reasonably be expected to occur, to avoid which a constant and additional degree of watchfulness would be required on the part of the engineers having trains in charge. They would know that they were always liable to find such working parties upon their road, but when and where, and under what circumstances, they would have no means of determining. And under the best management, on the part of the railroad company, accidents might reasonably be expected to occur from such causes. In the removal of such causes the railroad companies, and the traveling public, are greatly interested. Every thing that tends to increase the danger of travel upon our railroads, public policy requires should be prevented if practicable. The value of this right to the land owners is slight, and, in a majority of the cases, was probably well characterized by the defendant in this case, when he stated, in his testimony, that the damage for cutting the grass was not two and sixpence. The railroad companies are always likely to suffer severely in their property, in cases of accident. They are also, to a certain extent, liable to others for injuries resulting from such causes, and to this liability they should be strictly held. At the same time, we think they should have such sole and exclusive control of the land within the lines of their road, as shall enable

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them so to keep it as to exclude all probability of any accident resulting from any outside interference with such possession.

Upon the facts developed in this case, we think the *pro forma* ruling of the court below, in directing a verdict for the defendant, was erroneous.

Judgment reversed, and case remanded.

JACOBS V. ALLARD.

(42 Vt. 302.)

Riparian rights.

A mill owner has the right, in a reasonable manner, to discharge the waste from his mill, such as sawdust, shavings, etc., into the stream in the ordinary course of using such mill; but he has not the right, wantonly and needlessly, and out of the ordinary course in such cases, and not in the service of his substantial interest and benefit in the use of his mill in a reasonable manner, to throw such waste, or permit it to go into the stream, to the injury of inferior heritors.

SUIT IN CHANCERY. The facts are stated in the opinion.

A. J. Willard, for orator (plaintiff).

Timothy P. Redfield, for defendant.

BARRETT, J. The orators own and occupy a starch factory on a stream in Newark, deriving title to the water-power and the site of the dry-house from the defendant's grantor, David Smith, to Oliver H. Smith, by deed dated May 21, 1862, in which is the following language: "Also the water-power, commencing at a spotted birch tree, and on the westerly line near the stream, etc., meaning to convey the land upon which the dry-house to the starch factory stands, and the water-power as above described, for use, except for grist-mill and saw-mill." The defendant derives title from the same grantor to the mill privilege and saw-mill, situated a little above said starch factory, and said *exception* inures to him. The defendant owned, and still owns, said saw-mill and privilege, and he and his grantors have owned and used them for many years for saw-mill purposes.

In 1866, and since the plaintiff's starch factory was erected and put to use, the defendant has put a shingle machine into his saw-mill, and has used it ever since. The complaint is, that the defendant, "with the intent and design to injure the orators and damage and hinder them from the use of the water for the purposes of their starch factory," threw into the stream the sawdust and shavings and waste from the shingle-mill, and placed them on the bank so that they fell in, and that they render the water impure and unfit for making starch, and clog the flume and penstock, and prevent the use of the starch factory, etc. The defendant's right to use his saw and shingle-mill is not questioned. The true idea of the law involved in and governing the subject of this cause is well stated and developed in *Snow v. Parsons*, 28 Vt. 459, and no useful purpose would seem to be served in collating the various and extensive learning of the books as bearing on the subject, beyond what is comprehensively embodied in its practical results by REDFIELD, C. J., in that case.

In applying the law as set forth in that case to this, it seems plain that the defendant, in the use of his shingle-mill in a reasonable manner, has the right to discharge the sawdust, shavings and waste from it into the stream in the ordinary course of using such mills, and that he is not bound, as matter of law, to prevent them from going into the stream, and have them accumulate or draw them off and deposit them so that they cannot get into the stream. On the other hand, he has not a right, wantonly and needlessly, and out of the ordinary course in such cases, and not in the service of his substantial interest and benefit in the use of his mill in a reasonable manner, to throw or permit them to go into the stream, when, by so doing, injury will be caused to the orators in the use of their starch factory. Except by the statement that the defendant, with the intent and design to injure the orators, etc., the bill does not show or claim that the defendant has conducted wantonly, or out of the ordinary course in the case of such shingle-mills and their use, or that he has needlessly, let the refuse from said mill go into the stream. The orators put themselves, by their bill, on the common right of riparian owners, not to be injured in the enjoyment of their water rights by other riparian owners on the same stream. They do not show or claim any right, by use or prescription, against the defendant, that would enable them to exclude him from using his shingle-mill in a reasonable manner, having reference to

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their equal rights to enjoy the use of the water of the stream, in a reasonable manner, for the proper purposes of their starch factory.

The question then, is, whether the evidence shows that the defendant, in the use of his shingle-mill, has transcended his right in violation of the concurrent right of the orators. This we must find, in order to warrant us in granting relief under the averments and prayer of the bill.

In the first place, the evidence makes a rather strong impression on our minds that much of the trouble which the orators claim, and give evidence to show, that they experience in the condition of the water as it comes to their works, is attributable to the manner in which they have constructed and adjusted a new dam in reference to their works, and to the lack of proper fenders and strainers to protect against impurities that may get into the stream from the mills and works above the orators. It would seem, that, by proper modes and means, which they could, without unreasonable pains and expense, have adopted and put in use, they could have secured themselves from the troubles complained of while the defendant was using his shingle-mill and letting the sawdust and waste from it go into the stream.

At the same time, we fail to find from the evidence the wrongful intent and design on the part of the defendant, as charged in the orators' bill; and we also fail to find such a state of facts as would warrant us in holding that the defendant has so transcended his own rights, in violation of the rights of the orators as riparian owners, in respect to the use of the water, within the scope of the bill, as to entitle the orators to the relief they pray.

As no exigency of the case would be served by our going into a critical analysis and discussion of the evidence, we deem what is above expressed as being sufficient for the occasion.

The decree of the chancellor is therefore reversed, and the cause remanded, with a mandate that the bill be dismissed with costs.

ANDERSON, appellant, v. ESTATE OF ANDERSON.

(43 Vt. 350.)

Domicile of insane person.

The guardian of an insane person is a substitute for his ward, with reference to all his interests, and has the right to change his domicile and to fix the locality of his person.

APPEAL from order of the probate court. The facts appear fully in the opinion.

Julius Converse and *Redfield & Gleason*, for appellant.

Heaton & Reed, for defendant.

WILSON, J. This was an appeal from an order of the probate court, for the district of Washington, appointing Helen H. Anderson administratrix of Charles D. Anderson, her late husband. The case comes into this court on exceptions to the judgment of the county court, and the principal question is, whether the probate court in that district had jurisdiction to settle his estate. It appears that Charles D. Anderson resided many years in Woodstock. In 1864 he married Helen H. Holmes, daughter of Edwin C. Holmes, of Montpelier. He took her to his house in Woodstock, where they resided, and he was in trade there, a member of the firm of D. Anderson & Son, until some time in June, 1866. In June, 1866, while said Charles D. Anderson was residing in Woodstock, and pursuing his business there as a merchant, he became insane, and by the advice of his physicians he was sent to the insane asylum at Brattleboro, and consigned to the care of Dr. Rockwell. It appears that soon after he was sent to the asylum, the said Edwin C. Holmes, at the request of Mrs. Anderson, made application to the probate court, in the district of Hartford, to have a guardian appointed for her husband, and, as such guardian for him, the probate court, on the 4th day of July, 1866, appointed said Holmes. The guardian, within a few days after his said appointment, commenced making an inventory of the property of the said Charles D. Anderson. He made inquiry of Dexter Ander-

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son, the partner of Charles D., as to the situation of the supposed partnership property and business, and was informed by him that Charles D. had no interest in the "concern." The guardian completed said inventory, which embraced all the property he could find belonging to his said ward, and returned the same to the probate court, but was not able to learn that his ward had any interest in the property or business which had been conducted in the name of D. Anderson & Son. Before, and at the time Charles D. was sent to the insane asylum, he and his wife had occupied, and were occupying, a dwelling-house in Woodstock, belonging to Dr. Powers, at a rent of \$300 a year. Mrs. Anderson, upon being informed by the guardian, at the time of making said inventory, that said Dexter Anderson, the father of her husband, claimed that her husband had no interest in the store, expressed herself unwilling to occupy a dwelling-house at a rent of \$300 a year any longer, and wished to go to Montpelier to reside. The guardian, on the 16th day of July, 1866, in accordance with the desire of Mrs. Anderson, removed her to Montpelier, to which place she went to reside. The guardian carried to Montpelier the personal property of his ward, including the household furniture and effects. Mrs. Anderson had assigned to her, rooms in the dwelling-house of the guardian for her use. The furniture of her husband was used to furnish those rooms, all which she has occupied, and resided there ever since. At the time she left Woodstock and went to Montpelier to reside, the guardian surrendered to Dr. Powers the possession of the dwelling-house previously occupied by the family. The guardian took possession of the property of his ward, paid all or nearly all of his debts, furnished his ward with clothing, and paid all his bills while he remained in the asylum. He remained in the asylum from some time in June, 1866, till his death, which occurred August 5th, 1868, during all which time his wife resided in Montpelier. Section 17 of chapter 48 of the general statutes provides, that "if any person shall die, being an inhabitant of this state at the time of his death, his will shall be proved, or letters of administration on his estate shall be granted, and his estate settled, in the probate district in which he shall have resided at the time of his death." Charles D. Anderson, at the time of his death, was an inhabitant of this state, and his residence or domicile at that time must determine the question of jurisdiction. By the term "*domicile*," in its ordinary acceptation, is meant the place where a person lives or has his

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home. In this sense, the place where a person has his actual residence, or inhabitancy, is sometimes called his domicile. In a strict and legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. A domicile, once acquired, remains until a new one is acquired. If a person has actually removed to another place, with the intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention of returning at some future period. Story on Confl. of Laws, § 46, n. 5. The place where a married man's family resides is generally to be deemed his domicile. So, too, if a married man has his family fixed in one place, and he does business in another, the place where his family reside is considered the place of his domicile. Section 5 of chapter 1 of the general statutes, relating to the qualifications of voters for town representatives, provides that "the town in which the family of a person shall reside, if he has one, shall be deemed the place of residence of such person." In *Abington v. North Bridgewater*, 23 Pick. 170, Chief Justice SHAW, in discussing the subject of domicile, says: "The place of a man's dwelling-house is first regarded, in contradistinction to any place of business, trade, or occupation. If he has more than one dwelling, that in which he sleeps, or passes his nights, if it can be distinguished, will govern." From these considerations, it would seem to follow, that, if Charles D. Anderson had, while sane, actually moved his family to Montpelier, with the intention of remaining there for an indefinite time, as the place of his fixed present domicile, it would be deemed his place of domicile, notwithstanding he intended to carry on business at Woodstock, returning to his family at Montpelier from time to time, when his business would allow him to do so. The case shows, that, in June, 1866, at the time Charles D. Anderson became insane, his domicile was in Woodstock. While he was insane he had no mind, no intent, in regard to his residence, his domicile, his property, or his person, and he exercised no free will as to any of these matters. The right of the guardian to change the domicile of his insane ward is founded on obvious principles of humanity and justice, and supported by authority.

If the guardian could not change the domicile of an insane person, he might be required to support him and his family at a place where

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the price of every thing necessary for their support was exorbitant, and greatly exceeding the means of the family. When Holmes was appointed guardian, he became substituted for his insane ward, with reference to all his interests, to act for him in the management of his property, and to fix the locality of his person and determine his domicile. General Statutes, 484, § 49; *Cutts v. Haskins*, 9 Mass. 542; *Upton v. Northbridge*, 15 id. 237. In the case of *Holyoke v. Haskins*, 5 Pick. 20, it appeared that Miss Elliot, the intestate, was *non compos mentis*. She was born in the county of Suffolk, and removed, upon the death of her father, into the county of Middlesex, where she lived as part of her brother's family many years and until her death, being for the last years of her life under a guardian, who provided for her support, whose residence was in Suffolk. In that case, the court decided that the domicile of a person *non compos mentis*, under guardianship, may be changed by the direction or with the assent of the guardian; that her domicile, at the time of her death, was in Middlesex; that the probate court of Middlesex county had jurisdiction, and that letters of administration on her estate, granted by the probate judge of Suffolk, were void for want of jurisdiction. It was strongly urged, that, upon the facts, the legal domicile of Elliot still continued in Boston (Suffolk county), the place of her birth, notwithstanding her removal to Natick, in the county of Middlesex, and her long residence there, because, by reason of her mental disability, she had not, it was said, the power to acquire a new domicile. The opinion of the court in that case was delivered by WILDE, J., in which he says: "It is clear that by our laws a guardian has the same power over his ward that a parent has over his child. He has the custody of his person and may appoint the place of his residence. The domicile, therefore, of an *idiot*, may be changed by the direction or with the assent of his guardian, whether expressed or implied." By the civil law, minors retain the domicile of their parents at the time of their decease, although they afterward remove with the consent of their tutors, curators or relations; because, by the civil law, they are not permitted to change the order of their succession to the personal property, which depends on the law of domicile. But under our statute the right of inheritance is not changed or affected by any change of domicile by the heir. The question in this case is one of jurisdiction, and not of succession or inheritance. Two things must concur to constitute domicile or change of domicile by choice — first, resi-

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dence; and, secondly, the intention of making it the home of the party. Charles D. Anderson was insane when sent to the asylum at Brattleboro. He continued insane while he remained there, and had no intent as to his residence or domicile. He was sent to the asylum for medical treatment and care, and his guardian kept him there for that purpose, without any intention of making Brattleboro the domicile of his ward. But we think the testimony tends to show that the guardian did intend to change the residence and domicile of Charles D. Anderson from Woodstock to Montpelier. Besides the facts before stated, it appears that the physician expressed serious doubts, at the time Anderson was taken to the asylum, as to whether he would ever become a sane man, and within six months from that time they pronounced him incurable. The circumstances disclosed by the testimony tend to show that the guardian, in the exercise of his discretion, might remove, and that he did remove, Mrs. Anderson to Montpelier, with the intention of remaining there for an indefinite time, and as the place of the then fixed present domicile of the family, there to remain until the death of his ward, or until his ward should become sane and manage his own affairs. The personal presence of the husband at Montpelier was not necessary to constitute his domicile there under the circumstances. If the guardian determined that the domicile of the family should be at Montpelier, and actually removed Mrs. Anderson there with her consent, or if she removed there by his direction, or with his assent, it would constitute a change of domicile from Woodstock to Montpelier, as to the husband as well as his wife. If Anderson had become sane, it is quite likely he would have gone to his new residence and domicile at Montpelier. He had no family establishment at Woodstock after July 16, 1866, and no domicile there after that date. The testimony in the case has a legal tendency to prove that the domicile of Anderson was changed by his guardian from Woodstock to Montpelier; that he resided at Montpelier at the time of his death, within the meaning of section 17 of chapter 48 of the statutes above quoted, and the decision of the county court upon the weight and sufficiency of the evidence is conclusive, and cannot be revised in this court.

The judgment of the county court is affirmed.

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BEMIS V. CONNECTICUT AND PASSUMPSIC RIVERS RAILROAD CO.,
appellant.

(43 Vt. 375.)

Railroad — duty as to fences — cattle trespassing — care.

The obligation upon railroad companies to build a fence along their road only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers there.

In an action against a railroad company, in favor of the owner of an animal killed, while unlawfully on the track, by a train of cars running at the usual rate of speed, the mere fact that the speed of the train was not checked while approaching the animal does not tend to show want of ordinary care. Nor does the mere fact that the engineer did not discover the animal until the engine was close to it show want of such care.

In such case, the first duty of the company and its servants is to provide for the safety of the passengers and property on the train. Its next care may be for the safety of its own property; and, lastly, it must exercise such a degree of care as is consistent with the prior objects, to avoid injury to the trespasser.

ACTION on the case, to recover the value of a bull injured or killed by defendants' engine.

The plaintiff's evidence was, that, on the 15th of September, 1865, the bull got out of plaintiff's pasture into a lot belonging to one Morgan, and adjoining the defendants' track, and that from there it broke over the defendants' fence on to the track, and was struck by the engine; that the said fence was not suitable or of lawful height; that the animal might have been seen by the engineer of the train for a distance of seventy-five rods from the place where it was run over; that the train might have been stopped within that distance; and that the train was that night behind time, and was running at an increased rate of speed. The defendants' evidence was to the effect that they were driving at the usual rate of speed; that the bull was not seen until just before it was struck; that the whistle was sounded as soon as the animal was discovered. There was no pretense that the animal was rightfully in Morgan's field.

The jury having returned a verdict for the plaintiff, the defendants brought this appeal.

Bliss N. Davis, for the defendants, cited *N. Y. & E. R. R. Co. v. Skinner*, 19 Penn. St. 298; 1 Am. Law Reg. 97; 5 il. 49; Redf. on Railw. 375, n. 5; 12 Eng. L. & Eq. 520, note.

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Thomas Bartlett, for plaintiff, cited *Kerwhuker v. Cin. R. R. Co.*, 3 Am. Law Reg. 341; *Quimby v. Vt. Cent. R. R.*, 23 Vt. 387, *Trow v. Same*, 24 id. 487; *Jackson v. Rut. & Bur. R. R.*, 26 id. 150; 28 id. 180.

WILSON, J. It is settled law in this state that the obligations upon railroad companies to build a fence along their road only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers there. The case shows that the plaintiff's bull was a trespasser upon the defendants' premises, presumed to have escaped from the plaintiff's inclosure and strayed upon the track, through the insufficiency of his fences, which, in law, is the same as if the plaintiff had suffered the animal to go at large, without any restraint whatever. *Jackson v. R. & B. R. R. Co.*, 25 Vt. 150. The plaintiff has no remedy against any one, if the animal was killed or injured without negligence, at the time, in the management of the engine. *Jackson v. R. & B. R. R. Co.* 25 Vt. 150; 12 E. L. & Eq. 520. The important question is, what degree of care and diligence were the defendants bound to exercise in respect to the plaintiff's property while it was thus unlawfully upon the defendants' premises. Upon this question, the court below told the jury that "the defendants were bound to exercise due care in the speed of their train, to use due diligence, while running their train, in looking out for obstacles on the track, and due diligence in checking their speed if animals are even wrongfully on the track." What amounts to ordinary care on the part of a railroad company and their agents, depends upon the nature of their employment, the condition of their road, locomotives and cars, the duty of the agents in running the train, and the circumstances under which the injury occurred. It is unquestionably true that persons engaged in building railroads, locomotives and cars, and in running the train, are justly held to a higher degree of skill, care and diligence than that which is requisite in the ordinary pursuits of life. For the protection of the persons and property of individuals in charge of the agents of the company on the train, the company are held to exercise the highest degree of care and diligence. They should be held to exercise such care and diligence as the perils of that mode of conveyance require, and, with a due regard to this paramount obligation and duty, they are bound to exercise what would be, under the circumstances, ordinary and reasonable care to avoid unneces-

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sary injury to property not in their charge, even though such property is unlawfully on their railway track. It is with regard, mainly, to this paramount object, that the usual or general speed of trains on our railroads is regulated. What constitutes due care in the speed of the train depends chiefly on the condition of the road, in respect to its track, grade and curves, the height or depth of the track above or below the margin of the road, its liableness to obstructions, by natural and unavoidable causes, the crossings, if any, the condition of the locomotive and cars, the distance from the train the engineer would be able to discover an obstacle on the track, and the skill and experience of engineers and others in charge of the train. The condition of the road constitutes a very important consideration in determining what speed of the train would be reasonable, with reference to the persons and property on the train. By the condition of the road, I mean its condition as constructed for running trains over it, its fitness for that purpose, and its liableness to be obstructed by natural and accidental causes. But railroad companies are not bound to regulate the general speed of their trains on the assumption that the track will be unlawfully obstructed. To require this of such companies would be against all reason. It would subject them and their interests, and the persons and property on the train, to the will and control of trespassers, which would be little less than offering a reward to wrong-doers, at the risk of the lives and property of the innocent. When the speed of the train is such as the condition of the road, locomotive and cars, and the skill and experience of those in charge of the train, require for the safety of the passengers and property on the train, the company should not be subjected to liability for damage to a mere trespasser whose property was injured by being unlawfully on the track, unless such damage was occasioned by the neglect of the company, or their agents, to exercise that degree of care and diligence that would have been required of them if the obstruction had not been there, or by their neglect to exercise that degree of care which, under the circumstances of the case, might have been exercised in respect to the property of a trespasser without peril to the train or its passengers. From this view of the subject, it follows, that, if running the train at the rate of twenty, twenty-five or thirty miles an hour is reasonable speed, on a given road or piece of road not known by the company or its agents in charge of the train to be obstructed, it is reasonable speed with refer-

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ence to the question whether an obstacle will unlawfully go, or be placed upon, the track while the train is approaching. It is unquestionably true, that railroad companies are responsible that their agents in charge of trains shall exercise due diligence in looking out for obstacles on the track, whether such obstacles be accidentally and unavoidably or unlawfully there. This care is demanded for the safety of persons and property on the train, and the best interests of the company, as well as the demands of the public, require its exercise. In regard to the speed of the train when approaching an obstacle unlawfully on the track, whether it would be the duty of the company to check the speed of the train, on account of such obstacle, would depend on its nature, the distance of the train from it at the time it was discovered, and in case of animals or an animal wrongfully on the track, whether the use of the usual means, namely, the bell, whistle and nearer approach of the train, would be likely to drive them off the track; and more especially it would depend upon the question whether the safety of persons and property on the train, or the interests of the company, require that the speed be checked where the obstacle is discovered in time to do so. The first and paramount duty to be observed, when danger is apprehended from such obstruction, is the safety of persons and property on the train, or otherwise lawfully on the track, and as to such the law demands the exercise of the highest degree of care and diligence by the company and their agents. The next object of the attention of the agents of the company is the safety of their own property. They are bound, while discharging these higher obligations and duties, and in the exercise of their right, to protect the property of the company from injury to which it is exposed by the unlawful act or neglect of another, to exercise ordinary care to avoid injury, even to a trespasser. But the person whose property is unlawfully upon the railway track has no right to expect it will be protected, unless it can be done consistently with the higher obligations and responsibilities resting on the agents of the company. The ordinary means employed to drive cattle off the track are the noise of the train, and the noise of the bell and whistle, and these are generally sufficient for that purpose, without checking the speed of the train. The noise of a running train, when approaching an animal and near it, is generally sufficient to drive it from the track, and this agency is continually operating while the train is running, and it would have more or less effect to remove such obstacle, even though the animal

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was not discovered by the engineer. The other means above indicated should be seasonably employed—that is, they should be employed immediately upon the discovery of such obstruction, and the engineer is bound, while running the train, to exercise ordinary care in looking out for obstacles on the track, so that he may seasonably employ such means to remove them as are ordinarily sufficient for that purpose. An engineer, when running his train with ordinary care and vigilance, and examining the track as far as consistent with his other duties, has discharged all obligations which the company are under to one whose animal is on the track through the wrongful act or neglect of the owner, unless the safety of the passengers and interests of the company require, or would allow, the train to be stopped, or its speed checked, and it can be so done without injury. And in such case, what the interests of the passengers or company require is ordinarily best determined by an experienced engineer. As to property wrongfully on the track, the company should be responsible that their agents act in good faith and with common prudence. If an engineer use such means as are usually sufficient to drive cattle from the track, without unnecessary injury, the company should not be held liable to the owner of property injured while unlawfully on the track, even though he misjudged as to the best means to be used.

It follows, from these remarks, that, in a suit against a railroad company, in favor of the owner of an animal injured by the locomotive while the animal was unlawfully on the railway track, and the train was running at the usual speed of running the train at and near the place where the injury occurred, the mere fact that the speed of the train was not checked while it was approaching the animal does not tend to show any want of ordinary care or diligence on the part of the company, or the agents, in running the train, in respect to the rights of the owner of the property so injured. But, in a suit in favor of a passenger who was injured by the train being thrown off the track by such unlawful obstruction, it is obvious, for the reasons before stated, that the company should be held to a higher degree of care and diligence than would be required of them in a suit in favor of the owner of the animal, for damage to the property which contributed to the injury of such passenger. As to the persons and property on the train thus thrown off the track, the circumstances might show it was the duty of the agents of the company to check the speed of the train, if in their power. We have

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no occasion to decide or consider the circumstances under which it would be the duty of the engineer to check the speed of the train when a human being is unlawfully on the track. That the life of a human being is of more consequence, and of greater value, than mere property, does not admit of debate; but, in attempting to save the life of a person unlawfully on the track of the road, I think the law would not allow any relaxation of the rule in respect to the requisite degree of care and diligence which the company and their agents would be bound to exercise for the safety of persons *lawfully* on the train or track. The distinction between the different degrees of care and diligence requisite in the various pursuits and relations of life does not exist by force of arbitrary rules merely, but has its origin in those moral precepts which commend themselves to the understanding, and should meet the approval of all men. This distinction becomes more apparent when considered with reference to the different objects of care and diligence, and the obligations and duties which persons in the *right* owe to those in the *wrong*, especially where, in *law*, no privity exists between them, and compared with those relations which arise from contract, and imply mutual confidence and trust. The company must, from the very nature of their employment, in order to the security of their passengers and workmen, and the enjoyment of their road, have the right, at all times, to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy, even by the former owner, in any mode and for any purpose. The right of the company is, for all purposes of the road, the same as that of an owner in fee, as was decided in a late case in Bennington county. *Redfield on Railways.*

The fact that the business of a railroad company is one of extraordinary peril to cattle coming upon the road makes it of the first necessity that the owners of cattle, especially those to whom the company owe no duty in respect to fences, should restrain and prevent them from straying into the field of another, and from thence upon the track of the railroad. The plaintiff had no legal claim, either upon the defendants, or Morgan, the adjoining proprietor, to keep the railroad on the adjoining lands fenced for the security of the plaintiff's cattle. How far the omission of the defendants to maintain a legal fence against cattle wrongfully in Morgan's field might be regarded as negligence in respect to the safety of passengers on the train, we have no occasion to discuss here. But it is clear there is in law no such privity between the plaintiff who may

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be remotely affected by such omission, and the defendants owing the duty, as will constitute culpable negligence. The omission of the defendants to maintain a legal fence, as against the cattle of the plaintiff, while they were wrongfully in Morgan's field, was, at most, as to the plaintiff, an omission of a moral duty; but the neglect of the plaintiff to restrain his cattle was in violation of a legal duty he owed to the defendants, and the passengers and property upon the train. The plaintiff was legally in fault: it was by his fault the road was obstructed. It has been held, that, where the injury arises neither from design nor from wanton and gross neglect, but simply from the neglect of ordinary care and caution, and the parties are mutually in fault, the negligence of both being the immediate or proximate cause of the injury, a recovery is denied, upon the ground that the injured party must be taken to have brought the injury upon himself. But we do not recognize or admit the soundness of the doctrine of some of the cases, that "a man is under no obligation to be cautious and circumspect toward a wrong-doer." For it is clear, that, even in the absence of any reciprocal obligation, there is an original moral duty enjoined upon every person so to conduct himself and his business, or exercise his own rights, as not to injure another. But this moral duty ceases, it has no binding authority, when it cannot be exercised toward the wrong-doer consistently with the higher law of self-protection, or the protection of those lawfully in the charge of another, in respect to which the legal obligation and moral duty concur. Applying these principles to the present case, it is clear that the charge of the court below cannot be sustained. The substance of the charge is, that the defendants were bound to use ordinary care and prudence toward the plaintiff's property; that ordinary care and prudence bound the defendants to use due vigilance, while running their train, in looking out for obstacles on the track; that ordinary care and prudence toward the plaintiff's property, although it was wrongfully on the track, required the defendants to use due diligence in checking the speed of the train; and if, by the exercise of such degree of diligence as might, fairly and reasonably, generally be expected of an engineer, in running a train, "he would have perceived the animal in a position where danger should reasonably have been apprehended, *he should have so checked his speed as to avoid the accident, if in his power.*" The court then told the jury that, in determining whether the engineer was using this degree of

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care, and whether, by want of it, the accident occurred, they would consider the nature of the grade and curves, and of the power used, the length of the road over which the point of the accident could be seen before it was reached, the speed of the train, the situation of the animal, so far as the evidence gave any light upon the subject, and all the circumstances, so far as they appeared from the evidence. It seems to us that the charge was calculated to mislead the jury. We cannot infer, from the charge, that the duty the defendants owed to the passengers on the train, when in peril, or the right the defendants had to protect their own property or interests from injury by the wrongful act or neglect of the plaintiff, was considered by the jury in determining whether the engineer was using ordinary care and prudence at the time the accident occurred; for the jury were, by the charge, confined to the consideration of matters upon which they could not have determined the question of such care and prudence, as applicable to the facts of the case. The jury would very naturally understand from the charge that ordinary care and prudence toward the plaintiff required the engineer to check the speed of the train if in his power, without any regard to the consequences that might have resulted therefrom to the passengers, train, or interests of the company. Such requirement of the engineer would amount to the highest degree of care and prudence toward the plaintiff's animal; it would make the safety of the plaintiff's bull, though wrongfully on the track, the first and paramount object of the attention of the engineer, and the safety of the passengers on the train, and the interests of the company, matters of secondary importance. It has been shown in the forepart of this opinion that the engineer was under no obligation to save or protect the plaintiff's property, unless he could do so consistently with the higher obligations and responsibilities of the defendants to the passengers and property in their charge on the train. The running of the train at usual and reasonable speed with reference to the safety of the passengers and property in charge of defendant's agent, and with reference to the interests of the company, amounted to ordinary care and diligence as to the plaintiff's property while it was on the track, and the fact it was there was not known to the engineer. The case does not show there was any testimony tending to prove that the speed of the train was unusual or unreasonable with reference to the safety of the passengers or property on the train when the track was not obstructed. The evidence does not tend to show

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any want of care or prudence at the time or after the engineer discovered the animal on the track, and it would seem that the engineer did use ordinary care and prudence toward the plaintiff's property, unless the failure of the engineer to discover the animal in time to have made any more seasonable effort to avoid the accident arose from neglect to use due vigilance in looking out for obstacles on the track. The case states that the plaintiff gave testimony tending to prove that the animal might have been seen for seventy-five rods on the track south of the point where the same was run over; also, that the speed of the train could be checked in that distance, or even in fifty rods, so as to avoid accident. If we construe the testimony as tending to prove that the animal was on the track when the distance between the animal and the train was seventy-five rods; that the engineer would have perceived the animal for that distance on the track, if his eye, at that moment, had been directed to the point at which the accident occurred; and that the speed of the train could be checked in that distance before mentioned, it would not follow as a necessary or even probable conclusion that there was any want of vigilance or care in looking out for obstacles on the track. It will not do to say that an engineer is bound at all times while running a train to keep his eyes on the track for the distance of seventy-five or even fifty rods forward of the train when he has no reason to apprehend that the track is obstructed, for his engine or some other object near the train may necessarily require his attention and care, and a skillful and prudent engineer would discharge such duty when he could reasonably suppose the track was free from obstruction. The train was running at the rate of twenty-five miles an hour; therefore if the attention of the engineer at the moment the animal might first have been seen on the track was necessarily directed to his engine or some other object near the train, which for the time prevented him from viewing the track as far as the point at which the accident occurred, the fact that he did not perceive the animal until it was so near the train that the engineer could not avoid the accident, does not tend to show any want of care as to the plaintiff's property so wrongfully on the track.

Ordinary care as to the property of a trespasser would not allow the engineer to neglect the more important duties he owes to the train and its passengers. It does not appear that there was any thing in the situation or condition of the road, at or near the

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point of the accident, requiring the engineer to keep his eyes fixed constantly on the track for the distance of fifty rods forward of the train, or to check his speed on that part of the road. There is nothing in the case tending to show that the engineer had any reason to believe or even suspect that the track was, from any cause or in any manner, obstructed. The case shows that the engineer was running the train prudently and safely in regard to the contract obligations of the defendants and the interests of their road. The court told the jury that if, by the exercise of ordinary care and prudence, "the engineer would have perceived the animal in a position when danger should reasonably have been apprehended, *he should have so checked his speed as to avoid the accident, if in his power.*" The rule indicated by this part of the charge makes no distinction between the rights of the trespasser and those rights arising from contract obligations; it allows the exercise of no discretion by the engineer in time of danger; but makes it the imperative and paramount duty of the engineer to protect the property of the trespasser, if in his power. While it is true that the defendants are held responsible that their engineer and other agents in charge of the train possess the requisite degree of skill and experience which fit them to exercise sound discretion and judgment, and that they will use such degree of care and diligence as that employment and the peculiar circumstances by which they are surrounded require, it must be conceded that such skill and experience entitle an engineer to exercise some discretion in respect to the means to be used in order to protect the most important interests imperiled, when the whole cannot be saved. We assume, in the absence of any testimony to the contrary, that the defendants' engineer did possess the requisite amount of skill and experience to run the locomotive with ordinary care. It appears, from cases cited by the defendants' counsel, that the courts, in some of the states, hold that railroad corporations are liable to a trespasser upon their premises only for wanton or intentional injury. But, in 24 Maryland, 84, 108, and 3 Ohio, 172, the courts of those states hold, that such corporations are bound to use ordinary care as to property even wrongfully on their railway track. We think the exercise of this degree of care toward a trespasser is just in principle, and necessary in order to protect other more important interests involved. But the application of the principle to the determination of cases like the present should be made with a view to allow such corporations to discharge

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their paramount duties and obligations arising from contract, express or implied, which exist between them and every person on the train, or standing in such a relation as requires care on the part of those in charge of the train. Prudent men, in the management of their own affairs, in case of impending danger, would protect the most important interests, even though the protection of such interests rendered it necessary to sacrifice interests of less importance. They would make the same discrimination, and in favor of their own rights and interests, when in peril by the wrongful act or neglect of any other person; and they would understand that ordinary care in such cases does not require *persons in the right* to take any risk by an effort to save the property of the person by whose wrongful act the peril was occasioned. And the same principle is applicable as between railroad corporations and the mere trespasser upon their premises. Ordinary care toward the property of a trespasser does not require or allow such corporations to run any risk as to the life of any person on the train, or loss of any property there, in order to protect property wrongfully on their railroad track. If a person, whose property is wrongfully on a railroad track, could require the engineer to guard it from injury while there, at the risk of persons and property on the train, the number of persons who would venture to take that mode of conveyance would be small.

Engineers can safely use, and are required to use, the ordinary means to remove animals from the railway track; but, when such means fail, then the question, whether the engineer should stop the train, check its speed, or even increase the speed, if in his power, would depend upon what the safety of the passengers and train required; and, whatever their safety or the safety of their property required, under the circumstances, would be allowable as to property so wrongfully on the track. Upon the case presented by the bill of exceptions, the grounds on which the jury could legitimately have found a verdict for the plaintiff are not apparent; but, as the case is to be remanded for a new trial, we express no further opinion as to the tendency of the evidence.

The judgment of the county court is reversed, and the cause is remanded.

Dyer v. The Grand Trunk Railway Company.

DYER, appellant, v. THE GRAND TRUNK RAILWAY COMPANY.

(43 Vt. 441.)

Common carriers — damage to consignee by delay — lien for freight — replevin.

A carrier's lien on goods transported is only co-extensive with his right to claim and recover freight. Therefore, where carriers have, by delay in transporting and delivering goods, injured the consignee to an amount equal to their charge for freight, their lien ceases, and the consignee may maintain replevin for the goods without paying or tendering the freight.

ACTION of replevin for fifty barrels of flour and fifty barrels of corn belonging to plaintiff. Verdict for the defendant. The facts are set forth in the opinion.

Ossian Ray, for plaintiff.

George N. Dale, for defendants.

BARRETT, J. The only question is, whether the action of replevin may be maintained in the case made by the plaintiff's evidence, in substance as follows: The defendants, as common carriers, transported grain and flour from Detroit to Island Pond, for which the charge, at the established rates, was \$238. The defendant paid at Detroit, toward the purchase-money for the flour and grain, \$43.92.* Much longer than the usual time was occupied in the transportation, without excuse or explanation, and thereby damage was caused to the plaintiff to a larger amount than said charge for freight and money advanced. On the arrival of the property the defendants declined to deliver it to the plaintiff without first being paid said freight and money. The plaintiff made known the damage he had sustained by the delay in the transportation, and claimed, that, by reason thereof, the defendants were not entitled to be thus paid, and made a special demand for the delivery of the property. The defendants refused to deliver it on such demand unless first paid said freight and money. Thereupon the plaintiff brought this suit, and

* The plaintiff had purchased the flour and corn of one Leighton, in Detroit, and paid for it in advance. Afterward the said Leighton, in order to make a full car load, put in flour and grain in addition to that purchased by the plaintiff, to the amount of \$43.92, which sum the defendants voluntarily advanced to Leighton without the plaintiff's knowledge or consent.

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thereby obtained possession of the whole of said property. The right of the defendants to retain possession of the property after its arrival at the place of destination, and to refuse to deliver it to the plaintiff on his demand, depends on the question whether a lien existed in favor of the defendants upon it for the freight and money advanced. It is fundamental in the law, that the right of the carrier to have his freight results from performance, on his part, of the contract in virtue of which he undertakes and proceeds in the carriage of the property. If they should fail to carry, and have ready for delivery, they could not maintain a claim for freight. If in the carriage they should subject themselves to liability for damage to the consignee in respect to the property carried, that would disentitle them, to the extent of such liability, to demand and recover freight. And if the damage should exceed the amount of the freight to which they would otherwise be entitled, of course they would not be entitled to demand and recover any thing for the carriage of the property. Such seems to be the result of unquestioned principles, and of the decided cases bearing upon the subject. The carrier's *lien* is, of course, only co-extensive with his right to claim and recover freight. We have not been referred to, nor have we found, any case in which the question whether replevin could be maintained upon such facts as constitute the substance of the present case has been raised and decided. Of the case of *Cutting et al. v. The Grand Trunk R. Co.*, 13 Allen, 381, and of *Boston & Maine R. Co. v. Brown et al.*, 15 Gray, 223, all that can be said is, that in one the right to maintain replevin, in a case much like the one before us, was not questioned; and in the other it appeared that replevin had been maintained, either with or without controversy, where freight was claimed and refused when the suit was brought. The case of *Humphreys v. Reed*, 6 Whart. 435, embodies a principle which, in its legitimate results and applications, would seem to warrant the *replevin* in a case like the present. In that case the carrier delivered the goods to a wharfinger, with directions not to deliver them to the consignee till the freight should have been paid. The consignee called on the wharfinger for the goods, and was told by him what his instructions were. Thereupon, he insisted to the wharfinger that the goods had been damaged in the transportation, through the fault of the carrier, to an amount exceeding the price of the freight, and that he had a right to have his goods without paying the freight, and the wharfinger delivered them to him. Thereupon,

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the carrier sued the wharfinger in trover for the goods, relying on his lien for the freight. The defense set up was, the damage to the goods, and it was held, that, such damage being shown, he had no right to claim the payment of freight of the consignee, and, of course, no right to hold the goods himself, or authorize another to hold them for him as against the consignee, and he was defeated in the action. It is true that some fifty years ago it was held in England that such damage could not be set up in defense, in whole or in part, to a claim for freight, when the goods had been delivered. But that doctrine has been discarded in this country, and a contrary doctrine established. See *Snow v. Carruth*, SPRAGUE, J., Dis. Ct. Mass. 19 Law Rep. 198; also *Humphrys v. Reed*, *supra*, which overruled *Davidson v. Groynne*, 12 East, 380, and *Shields v. Davies*, 6 Taunt. 65.

There would seem to be no good reason why the liability of the carrier to the freighter for the damage accruing, through his fault, in the carriage of the property, should not be asserted and determined by way of defense to his claim for freight, as well as by a cross action for such damage. Indeed, not only do the analogies of cases involving similar relations of subject-matter and parties justify it, but there are reasons peculiar to this particular class of cases that seem to render it peculiarly proper.

I only mention one, viz.: The impolicy, and in some cases the exposure to loss, of compelling the freighter to pay the demanded freight, and trust to the responsibility of the carrier at the end of a lawsuit for the damage sustained by him through the fault of the carrier in the transportation for which he has claimed and been paid the freight. When the carrier sues for his freight, he gets all he is entitled to from the freighter, when he is made to allow as against his claim such damage as his own fault has caused to the freighter. No question of lien is involved in such a case.

The same reasons, grounded on principle, and arising from convenience, seem to justify the action of replevin in cases like the present. The question of the carrier's right to freight, and of liability for damage, can as well be tried in this action as in any other mode of suit or procedure. The defendant is subject to no peril of losing any security he may have had by virtue of his lien on the property, for he has not yielded his lien, and the replevin bond has become substituted for the property itself. The property has thus been put to the uses designed, and the defendant is secured for all

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the rights he had in respect to the freight, as fully as if he had retained custody of the property itself.

As to the \$43.92 advanced and paid by the defendants toward the purchase of the goods, this was paid without request of the plaintiff, and by reason of the party of whom the plaintiff purchased, putting in, to make out a full car-load, more grain than the plaintiff sent money to pay for.

As the defendants asserted their right to hold all the property until this sum, as well as the freight, should be paid, without designating any particular part or portion which they claimed to hold, either as their own property or by way of lien, and as the plaintiff took the whole upon his replevin, claiming and treating the whole as being his own property, we think this conduct of the parties was a ratification by the parties of the transaction as an authorized purchase by the plaintiff, and an authorized payment on his account by the defendants, and that the defendants' claim for such payment was put and treated as standing on the same ground, so far as claim and lien are concerned, as their claim and bill for freight.

Judgment of county court is reversed, and the cause remanded.

CUTTS, appellant, v. BRAINERD *et al.*

(43 Vt. 562.)

Common carriers—liability beyond route—special contract.

Where goods were shipped over the line of common carriers, marked for a point beyond their line, and they gave a receipt therefor, wherein they agreed to forward and deliver the said goods, leaving the name of the consignee and the place of deposit blank,—*Held*, that the receipt constituted a special contract that the carriers would deliver the goods at the place of destination, even beyond their own route.

ACTION of assumpsit, to recover the value of goods shipped over the defendants' road. The goods were delivered by the plaintiff to the defendants' agent at Burlington, who gave the following receipt therefor:

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"VERMONT CENTRAL RAILROAD COMPANY, }
BURLINGTON, September 18, 1866. }

"Mark and Numbers:

W. R. Lewis,

Brooklyn, Iowa.

Received from W. R. Lewis,

1 Box, weight 850.

"Numbered and marked as above, which the company promises to forward by its railroad, and deliver to , or order, at its depot in , he or they first paying freight for the same, at the rate customary per ton of 3,000 pounds. N. B. If merchandise be not called for on its arrival, it will be stored at the risk and expense of the owner.

"G. S. APPLETON, for the corporation."

The goods were never received by the consignee. The freight had been paid. The court directed a verdict for the defendants, and the plaintiff appealed.

Lawrence & Burnap, for plaintiff.

E. J. Phelps & Dewey, Noble & Smith, for defendants.

BARRETT, J. A majority of the court are of opinion that the receipt in this case, of itself, constitutes a contract between the parties, that the defendants, being common carriers, would carry said box to its destination — Brooklyn, Iowa — as per the marks thereon. As giving such character and effect to the paper, much importance is attached to the fact that the blanks were left unfilled. This effect given to the receipt renders it needless to consider the question, very much discussed in the argument, whether railroad companies, as common carriers, are, *prima facie*, bound to carry and deliver freight beyond the limits of their own respective roads, by the fact merely of receiving packages marked and destined to points beyond such limits.

I concur with my associates to the extent that the liability of the defendants in this instance is fixed, as by a special contract, by said receipt. But, in my opinion, that receipt does not import or tend to show an undertaking on the part of the defendants to transport the box beyond the terminus of their road, in the line of transportation from Burlington to the place of its ultimate destination. I think it is a contract thus to transport it, and that, at such terminus, it would be the duty of the defendants to make delivery or disposition of the box for its transit onward, according to the established rules and usages of the business in that behalf at that point.

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Pursuant to the opinion of the majority of the court, the judgment is reversed, and judgment is rendered for the plaintiff, for the sum stipulated.

CLAPP, appellant, v. CITY OF BURLINGTON.

(43 Vt. 579.)

Taxation of stock in national banks.

The owner of shares of the stock in a national bank should be taxed therefor, in the city or town where he resides, and not in the city or town where the bank is located.

ACTION of assumpsit for money had and received, etc. The following is the agreed statement of facts:

That the said city of Burlington had duly accepted the act of incorporation, and the acts in amendment thereof, and had organized under the same, prior to the year 1866; that on the first day of April, 1866, the plaintiff was a resident of said city; that in the same year he was set in the grand list of said city, by the assessors of said city, in the sum of \$374.55; that said sum was made up and set in said list, upon the following personal estate then owned by the plaintiff, to wit:

Fifty-six shares of stock in the National Union Bank, Swanton, appraised at \$2,730; two hundred and fifty shares in the Vermont National Bank, St. Albans, appraised at \$24,375; other personal estate appraised at \$10,150, and one poll of \$2, making a grand list of \$374.55; that of said list of \$374.55, \$271.05 was assessed upon said shares of stock and said banks, as aforesaid; that N. B. Flanagan, then collector of taxes of said city, had in his hands, on the 1st day of February, 1868, rate-bills and warrants for the collection of city, highway and union school taxes, amounting to \$400.73, which was assessed against the said plaintiff upon said list of \$374.55, as follows, to wit: city tax, \$280.87, highway tax, \$74.91, and union school tax, \$44.95; that afterward, on the 1st day of February, 1867, the plaintiff paid said taxes under protest, to said Flanagan, as such collector; that afterward and before the commencement of this suit, the said Flanagan, as such collector, paid over said taxes, as directed by said rate-bills and warrants.

It is further agreed, that the said National Union Bank, and the said Vermont National Bank, were, at the time when the said stock in said banks was set in the list, and said taxes assessed thereon against the plaintiff, as aforesaid, banking associations duly incorporated and organized under the laws of congress, and that said National Union Bank was located and doing business at Swanton, and the said Vermont National Bank was located and doing business at St. Albans, in said county of Franklin. But the plaintiff's stock in said bank was not, nor was any of it, set in the list in any other place than Burlington, in the year 1866, nor were any taxes thereon paid, for that year, except as above stated.

Upon these facts the court rendered judgment *pro forma* for the defendant, from which judgment the plaintiff appealed.

Bailey, Davis & Adams, for plaintiff, cited *City of Utica v. Churchill et al.*, 33 N. Y. 162, 229, 243; *Markoe v. Hartranft*, Am. Law Reg., vol. 5, 609, vol. 6, 487.

E. R. Hard, for defendants.

PIERPONT, C. J. The agreed statement of facts, upon which the judgment of the court below was based, presents the distinct question, Where, in this state, shall the owners of shares of the stock in the national banks located in this state be taxed, whether in the town or city where the owner resides, or in the town or city where the bank is located?

Under the statutes of this state regulating the matter of taxation, etc., no question is made but that the place where the owner of such stock resides is the place where such stock shall be set to him in the grand list, and he be subject to taxation thereon; but it is insisted, on the part of the plaintiff, that the provisions of our statute, in this respect, are at variance with, and contrary to, the requirements of the act of congress, of June 3, 1864, creating the national banking system, and under which said national banks were organized. The portion of said act which bears upon this question is contained in the proviso to the 41st section, and is as follows: "Provided, that nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate from being included in the valuation of the personal property of such person or corporation in assessment of taxes imposed by or under

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state authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state; provided, further, that the tax so imposed under the laws of any state, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located."

There is nothing in the case to show that there was any violation of the foregoing provision in taxing the plaintiff for his stock in the banks referred to, unless it was in putting said stock in his list, and taxing him, in Burlington, where he resided, instead of the towns where the banks were located; and, in determining whether there was a violation of the law in this respect, it becomes necessary to inquire what congress meant by the words used in the passage above quoted, "*at the place where such bank is located.*" The word "place" is a very indefinite term. It may refer to a very small or to a very large space, and must be construed with reference to the connection in which it is used, the subject-matter spoken of, and the object in view. It is manifest that it was the intention of congress, by this provision, to impose certain restrictions upon the state governments, in respect to the taxation of the owners of the shares in national banks, so as to prevent unjust and unequal taxation that it was anticipated might result from the action of state governments that were hostile to the system. This we think was the sole object of the provision; and, to this end, it is provided, among other things, that the stock shall be taxed by or under the authority of the state at the place where the bank is located, and not elsewhere. The purpose was, to prevent the same stock being taxed in two different states, as is sometimes done in respect to stock in the state banks, when the bank is located in one state, and stock therein owned by the inhabitants of another, both states taxing the stock. It was anticipated that the stock in the national banks might be so taxed; hence this provision confining the power to tax the stock to the state having jurisdiction at the place where the bank is located. We think that this reference to the place where the bank is located is for the sole purpose of determining what state shall have jurisdiction to tax the owners of the stock therein for such stock, and, when this was done, the end in view was accomplished. We can hardly conceive it possible that it was the intention of congress to interfere with, or to regulate, the internal system that might be adopted by the

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respective states for the assessment and collection of the taxes, any further than to prevent an unjust discrimination against the stockholders in the national banks. The general government could have no interest, or object, in determining into the treasury of which particular municipal government, within the state, the taxes should go, after they have been properly assessed and collected; and we are not disposed to put a construction upon the act that would convert it into such an attempt. In the provision referred to, congress is speaking of the powers of the respective states over the stock in these banks, in respect to taxing the owners, and its object was to secure equal and just taxation. The language used in respect to the authority to tax should be construed to refer to the action of the state legislatures, when it is susceptible of such a construction, rather than to the action of the officers of the several municipal corporations within the states. By so doing, all is accomplished that Congress designed, and the states left to regulate their own system of taxation, in their own way, without the unnecessary, not to say offensive, interference by congress therein. Congress could have no possible motive in determining in what particular town in this state the owner should be taxed for this stock; all that it desired was, that it should be placed upon the same footing with other property of a like character in the state, and owned by the residents thereof.

It was probably considered desirable that the new system should recommend itself to public favor, and to that end it was doubtless thought best, while securing equal taxation, to leave the form and manner of doing it, and the disposition of the money raised thereby, to the respective states; that is, to interfere with the authority of the states only so far as was necessary to accomplish the object.

This question was recently decided by the supreme court of Massachusetts in *Austin v. The City of Boston*. The case will be reported in the next volume of Allen. The proof sheets are before me. Judge HOAR, in delivering the opinion of the court, says: "The court are all of opinion that the true construction of the proviso does not confine the assessment of the tax to the place where the bank is located, and that it merely requires that the tax, to be valid, shall be imposed under the state authority existing at the place where it is thus located." Again he says: "We therefore think that the reference in the proviso to the place where the bank is located was designed to define the state authority which was to be allowed to impose a tax, and not to limit the place of assessment.

Williams v. Robinson.

By this construction we avoid a question of great difficulty in regard to the constitutional power of congress to direct or regulate the mode of state taxation."

In *Markoe v. Hartranft*, decided in Pennsylvania, the decision is substantially in accord with our own, although the views expressed by Judge AGNEW in some respects differ from those above. The case of *The City of Utica v. Churchill, et al.* is not an authority in this case, as it was decided upon the statute of that state, it being held that the taxation was in violation of their statute.

A majority of the judges of the supreme court of Maine, in answer to a question put to them by the governor, as to a bill then before the legislature, put a different construction upon this proviso, but gave no reasons for their opinion expressed.

On the whole, we think the decision in *Austin v. The City of Boston* is in accordance with principle and reason, and with the views expressed by Judge HOAR we entirely agree.

This view renders it unnecessary to consider the other questions raised in the argument.

The judgment of the county court is affirmed.

WILLIAMS, executor, v. ROBINSON, appellant.

(42 Vt. 333.)

Wills—probate of—burden of proof.

The burden is on the proponent of a will, not only to prove the due execution thereof, but also the testamentary capacity of the testator.

APPEAL from the decree of the probate court, admitting to probate the instrument in question, as the last will and testament of one John Robinson, deceased. The contestant alleged, that the deceased, at the time of making said instrument, was not of sound mind, etc.

The proponent introduced evidence to prove the due execution of the instrument as a will, and tending to prove the testamentary capacity of the deceased, at the time of the execution thereof. The evidence of the contestant tended to show that the deceased was not of a sound and disposing mind. The judge charged the jury, sub-

stantially, that the burden of proving incapacity on the part of the deceased was on the contestant. The jury returned a verdict in favor of the proponent, and the contestant appealed.

II. H. Wheeler, for the contestant, to the point that the burden of proof as to capacity was on the proponent, cited 2 Bla. Com. 374-376; *Harris v. Ingledew*, 3 P. Wms. [93] 1730; *Wallis v. Hodgeson*, 2 Atk. 56; *Hindson v. Kersey*, 4 Burn. Eccl. Law, 93; 2 Jarm. Wills (Perkins' ed.) 222; *Warner v. Warner*, 37 Vt. 356; Gen. Stat. 379, § 19; *Thornton v. Thornton*, 39 Vt. 122; 1 Cust. 637; 1 Red. Wills, 41, 44, note 30; *Comstock v. Hadlyme*, 8 Conn. 254; *Phelps v. Hartwell*, 1 Mass. 70; *Blaney v. Sargent*, id. 335; *Crowningshield v. Crowningshield*, 2 Gray, 524; 7 id. 74, 83; *Gerrish v. Nason*, 22 Maine, 438; *Rees v. Stille*, 38 Penn. 138; *The Parish Will Case*, 25 N. Y. 9; *Goodell v. Pike*, 40 Vt. 319.

Charles N. Davenport, for proponent, to the point that the burden of proving want of capacity is on the party alleging it, cited *Robinson v. Hutchinson*, 26 Vt. 38; *Dean v. Heirs of Dean*, 27 id. 746; *Hoge v. Fisher*, Pet. C. C. 163; *Stevens v. Vancleve*, 4 Wash. C. C. 262; *Pettes v. Bingham*, 10 N. H. 514; *Jackson v. Van Dusen*, 5 Johns. 144; *Jackson v. King*, 4 Cow. 207; *Allen v. The Pub. Admr.*, 1 Bradf. 378; *Hix v. Whittemore*, 4 Metc. 545; *Baxter v. Abbott*, 7 Gray, 71; *Sloan v. Maxwell*, 2 Green Ch. 563; *Trumbull v. Gibbons*, 2 N. J. 117; *Worstler v. Custer*, 46 Penn. 502; *Runyan v. Price*, 15 Ohio St. 1; *Duffield v. Robeson*, 2 Harr. 375; *Chandler v. Ferris*, 1 id. 454; *Hawkins v. Grimes*, 13 B. Monr. 257; 1 Redf. on Wills, ch. 3, § 5; 1 Swinb. on Wills, 45, part 2, § 3, part 4, cited in 1 Redf. 46, note 32; *Shelford on Lunacy*, etc., 274; 2 Greenl. Ev. § 689; 1 Jarman on Wills, 74, 75. The only exception among text writers is Perkins.

PIERPONT, C. J. This case was taken into the county court by appeal from a decree of the probate court for the district of Manchester, allowing and establishing an instrument presented as the last will and testament of one John Robinson, deceased. Upon the trial in the county court, the principal point in controversy was as to the mental capacity of the said John Robinson to make a will at the time when the instrument was executed.

The contestant, in his plea, alleges that the said instrument ought

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not to be allowed and established as the last will and testament of said John Robinson, "because, he says, that, at the time of the making of said instrument, said John was not of sound mind," etc. To this the proponent replies, "that, at the time of the making and executing said supposed will, the said John Robinson was of sound mind," and puts himself upon the country.

In submitting the case to the jury, the county court instructed them, "that, in this case, under the issue joined, the burden of proof as to the incompetency of said John to make said instrument rested upon the contestant, and that it was for him to make out, by a fair preponderance of proof, that said John was incapable of making the instrument at the time it was made, in order to defeat it upon that ground." To this charge the contestant excepts, and brings the case before this court; and the only question now before us is as to the correctness of the charge in this respect.

In determining this question, it may be well to look at the nature and object of the proceeding in that court, and the true relation of the parties of record to such proceeding. When the case is brought into the county court, by appeal from the probate court, it stands upon the same ground, and is to be proceeded with in the same manner, as though the county court had original jurisdiction of the subject, and the proceeding had been first instituted there. The judgment of the probate court is vacated by the appeal, and is of no force or effect. The proponent presents the instrument, and asks the court, by its judgment, to establish it as the last will and testament of the deceased. There is no presumption in its favor. The estates of deceased persons, by law, go to the heirs, unless a different disposition is made thereof by the deceased, while living, by a will. By our statute, "every person of full age and sound mind" may dispose of all of his estate, both real and personal, by his will, executed in accordance with the requirements of the statute. No person, unless of full age and sound mind, can so dispose of his property. Hence, when the proponent presents the instrument, he must satisfy the court that the deceased, at the time he executed the will, belonged to the class of persons that by law can make wills, and also that the instrument in question was executed by the deceased with all the forms required by the statute; and this he must do, whether any one appears to contest the will or not. This burden is upon him at the outset, even when there is no contest about the will. This being so, the appearance of a contestant cannot have the effect

to change or lessen the burden. If the contestant takes issue upon a single point only, as in this case, he does not thereby admit the other facts necessary to be established, and thus relieve the proponent from his obligation to prove them. This he cannot do by his pleadings, or otherwise. This proceeding is not like an ordinary suit at law, where the parties of record are the only parties in interest, and the only ones affected by the result. In such case courts act upon the concession of the parties, and render judgments thereon but, in proceedings of this kind, the judgment of the court is conclusive upon all the world, and ordinarily there are other persons interested, and that will be concluded by the result, besides the proponent and contestant, and their rights are not to be conceded away by the parties of record.

In this case, the only issue presented by the pleadings is as to the capacity of the testator, and the fact in this respect must be established by the proponent, even if it is not denied. It would be quite extraordinary if a denial of it should have the effect to relieve him from that obligation, and impose upon the party making the denial the burden of disproving it.

On the trial in this case, upon the issue formed, the proponent must first proceed with proof of the due execution of the will. If he fails in this, he fails in the proceeding. If he succeeds in proving due execution, it is claimed that a presumption arises therefrom of the capacity of the testator. Suppose that to be true, does it change the burden of proof, in the sense in which that expression is ordinarily used in reference to legal proceedings, so as to impose upon the contestant the necessity of proving affirmatively that the deceased, at the time of executing the will, was actually insane, or had not sufficient capacity to make a will? Is it not sufficient to rebut the presumption? Clearly it is. The presumption is no stronger than positive proof would be, if there was no presumption; and if, in such a case, the proof is met by the contestant with testimony that makes the question so doubtful that the triers are unable to find the fact of capacity, the instrument cannot be established, even though they might have the same difficulty in finding the fact of incapacity. The burden still rests on the proponent; and it is the same in respect to the presumption. It only stands in the place of proof, and aids to make out a *prima facie* case.

In the course of the trial, the balance of testimony may fluctuate from one side to the other, but the burden of proof remains where

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it was at the outset; and unless, at the close of the trial, the balance is with the proponent, he must fail. It is not sufficient that the scales stand even; there must be a preponderance in his favor.

I have thus far been considering the case upon the supposition that there is a legal implication that, when a will is executed in due form, the person executing it had the requisite capacity. If there is such a presumption, from what does it arise? Certainly it cannot arise from the fact that the great majority of mankind have sufficient capacity. The law will no more imply capacity from such a cause, than it will imply that all men are white because a majority are, or that all men are dishonest because so many are.

But it may be said that it is the duty of the persons called upon to act as witnesses to refuse to act and participate in the execution of a will, if they discover evidence of want of capacity, and that it is to be presumed they discharge their duty in this respect; and, having acted as witnesses, the law will therefore presume the capacity of the testator. Does the law ever presume that the witnesses to a will have discharged their duty in respect to its execution, when proof can be obtained? It is made the duty of the witnesses to a will, by statute, to see the testator sign the will, and to sign it themselves as witnesses in his presence, and in the presence of each other; and, ordinarily, there is attached to their attestation a certificate, over their signatures, that these statute requirements have been complied with. Yet the law makes no presumption in favor of the due execution of the instrument, but requires strict proof thereof. The object of this is to guard the testator against any fraud or imposition that may be practiced upon him in respect to his will. Why, then, should the law presume capacity, which is certainly the most important element in making a valid will, and the one best calculated to protect the testator against fraud and imposition? As we all know, it is much easier to impose upon one whose intellect is naturally defective, or has been impaired by age or disease, than on one whose mind is sound and vigorous.

The considerations above referred to will naturally have more or less effect upon the mind of the triers, as bearing upon the probability of the testator's having the requisite capacity. Beyond this, there seems to be no sound reason for giving it effect.

If, then, we are to hold that there is this legal presumption in favor of the capacity of the testator, it must be strictly upon the force of authority. And, although there are some respectable authori

ties that favor it, we think the weight of authority, especially in the more recent cases, is against it. Any attempt to reconcile the authorities would be useless labor. Judge Redfield, in his valuable work upon the law of wills, seeks to find some common ground that shall be consistent with all the cases, but without success. He concedes that the more consistent rule is the one that casts the burden of proof upon the proponent, both as to the execution and capacity; and, it seems to me, he might have added, the more sensible rule. I can see no good resulting from the presumption, but room for much evil. There is certainly no necessity for it, as proof on the subject is always accessible, and is presumed to be within the knowledge of the proponent's witnesses; then why not require him to prove it? It cannot have its origin in convenience, as in the case of other written instruments that are executed in the course of the ordinary daily business transactions between man and man, that are open, and in which all parties participate, and which take effect upon their execution. But wills take effect only at the death of the testator. They are ordinarily executed in private, without the presence or knowledge of those who are to be affected by them, unless it be some one who is to be affected favorably; and, in such case, there is an additional reason for caution and requiring proof.

The reason of the rule requiring proof is so strong, that, although we have no decision in this state upon the subject, the practice, I apprehend, is universal in our probate courts, to require of the proponent proof of the capacity of the deceased.

The rule requiring proof has been fully recognized and established in Maine. In *Gerrish v. Nason*, WHITMAN, C. J., says: "The presumption that the person making a will was, at the time, sane, is not the same as in the case of the making of other instruments, but the sanity must be proved." 22 Maine, 438. The same rule has been established in Connecticut. In *Comstock v. Hadlyme*, 8 Conn. 254, WILLIAMS, J., says: "Those who claim under the will must not only prove that the will was formally executed, but that the testator was of sound and disposing mind." We think the same rule substantially exists in Massachusetts. 2 Gray, 524; 7 id. 71.

This subject was very fully considered in *The Parish Will Case*, 25 N. Y. 9, in which the court held, "that, in all cases, the party propounding the will is bound to prove, to the satisfaction of the court, that the paper in question does declare the will of the deceased, and that the supposed testator was, at the time of making and pub-

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lishing the document propounded as his will, of sound and disposing mind and memory;" and, also, that this burden is not shifted during the progress of the trial, and is not removed by proof of the *factum* of the will, and the testamentary competency by the attesting witnesses, but remains with the party setting up the will.

But it is claimed that a different rule has been recognized in this state. In *Robinson, executor, v. Hutchinson*, the only question involved was as to the admission of the declarations of the testatrix, tending to show that she had been imposed upon in respect to the terms of the will. 26 Vt. 38. In *Dean v. Dean*, 27 Vt. 746, the question arose as to the due execution of the will, and not as to the capacity of the testator. In neither of these cases was the capacity of the testator in question, and what is said by the learned judge, who delivered the opinion, does not have the force of a binding authority upon this question.

Upon the whole, we think the better rule is, that which throws the burden on the proponent to prove the due execution of the will, and the capacity of the person executing it. Such rule is based upon sound reason, and tends to protect the rights of the testator and all persons that are to be affected by the provisions of the instrument; imposes no unnecessary hardship, and, ordinarily scarcely an inconvenience upon the proponent, and is well supported by authority.

The judgment of the county court is reversed and the case is remanded.

WINSLOW et al. v. THE VERMONT AND MASSACHUSETTS RAILROAD COMPANY, appellants.

(48 Vt. 700.)

Common carriers — liability for wrong delivery.

The responsibility of common carriers, as such, continues after the goods have reached their destination, until the consignee has had a reasonable time to call for, examine and take them.

The plaintiffs were induced, by representations of one Collins, to send goods addressed to "J. F. Roberts, Roxbury, Mass." The goods were sent over the defendants' line. Collins then went to Boston, and claimed and received the goods of defendant, under the name of "J. F. Roberts," which name he had assumed for the purpose of getting the goods. There was no such person as "J. F. Roberts," and no person who was known or passed by that name. *Held*, that the defendants were liable to the plaintiff for the value of the goods.

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The action was assumpsit to recover the value of certain goods. The following was the agreed statement of facts:

"On the 23d day of February, 1867, the plaintiffs were engaged in the rag and paper stock business at Brattleboro, Vermont, and one John Collins then was, and for some time previous thereto had been, in their employment in that business. On that day the plaintiffs had on hand and for sale the twenty-one sacks of rags mentioned in their declaration, and of the value of \$471.10. This fact was known to said Collins, who suggested to the plaintiffs that he was acquainted with a man in Roxbury, Massachusetts, by the name of J. F. Roberts, who was engaged in that business, and would be likely to purchase said rags, and advised the plaintiffs to write him upon the subject. On the said 23d day of February the plaintiffs, acting on said Collins' suggestions, wrote a letter to said Roberts, offering said rags for sale and describing them, which letter they mailed on that day at the Brattleboro post-office, directed to J. F. Roberts, Roxbury, Massachusetts.

"On the same day, or the day following, said Collins made an excuse to the plaintiffs for being absent from their employment and from town for a few days, and went away and never returned. On the 26th day of February, the plaintiffs received a letter through the Brattleboro post-office, purporting to have been written by J. F. Roberts, and which they in good faith supposed was an answer to their letter to him, but which was in fact written by said Collins in a disguised handwriting. The following is a copy of said letter:

" 'ROXBURY, MASS., February 26, 1867.

"W. W. WARD & Co.:

"GENTS:—Yours of the 23d is at hand, and would say, for blue stockings, 8 cents per lb., for Tr. clippings, 11 cents per lb.

Yours truly,

J. F. ROBERTS.'

"Acting upon this letter, the plaintiffs, on the 28th day of said February, delivered said rags to the defendants, who were common carriers of goods and merchandise between Brattleboro and Boston, Massachusetts, at their depot in Brattleboro. The defendants received said goods, and then and there undertook and promised the plaintiffs to transport the same to Boston, and there deliver them to said Roberts, the consignee. On the same day, the plaintiffs sent a letter to said Roberts, informing him that they had shipped the goods to him pursuant to his offer, but, hearing nothing from their

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goods for some three or four weeks after their shipment, went to Boston to look them up, when they ascertained what is hereby conceded to be true, that said goods safely and in due time arrived at defendants' freight depot in Boston; that said Collins had been in Boston awaiting their arrival; that when they arrived there he applied to one William Clough, who was the employee of a truckman and accustomed to take freight from said depot, whom he informed that his name was J. F. Roberts; that he had a quantity of rags at said depot directed to him, and requested him to go there and get them and carry them to a firm in Boston; that Clough went to said depot and applied to the defendants' freight agents for said goods, saying that Roberts had directed him to get them; that said freight agents delivered the goods to Clough upon his representation that Roberts directed him to get them, and Clough receipted for them in his own name upon the books of the defendants, and took them away, and delivered them where Collins had directed him, to a firm in Boston, to whom Collins had sold them, representing himself to be J. F. Roberts, of Brattleboro, Vermont. It is further conceded that there was in fact no such person as J. F. Roberts, but that this name was assumed by said Collins, for the purpose of defrauding the plaintiff of said goods; that after he sold them and collected the money for them, he left this section of the country, and the plaintiffs were unable to recover said money from him, or even to learn where he was; that after learning that it was Collins who had got their goods, they informed the defendants of it and demanded of them pay for the same, on the ground that they had wrongfully delivered them. Upon the defendants refusing to pay for them, this suit was brought. Said Clough paid the freight on the goods when he took them from the depot, and the defendants had no knowledge that any fraud was being perpetrated. The value of the goods at the time of their shipment was \$471.10. The defendants' railroad runs from Brattleboro to Fitchburg, Massachusetts, and the Fitchburg railroad runs from Fitchburg to Boston, which two roads it is hereby conceded, as to the plaintiffs, and in fact, constitute one line of road, but the delivery of said goods to Collins in the manner stated was by the agents and servants of the Fitchburg railroad company, and the above concessions and statement of facts are not to effect any legal claims or rights that may hereafter come in controversy between the two railroads in regard to the delivery of said goods."

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Judgment *pro forma* for the plaintiffs, from which the defendants appealed.

Clark & Haskins, for defendants:

The defendants, if liable at all, are only liable as warehousemen, and not as common carriers. Carriers by rail, except in special cases, are under no obligation to deliver to the consignee personally, or even to give notice of the arrival of goods. Redfield on Carriers, §§ 104, 105, 106; 1 Par. on Contracts (2d ed.), 663; *Thomas v. Boston and Providence R. R. Co.*, 10 Met. 472; *Norway Plains Co. v. Boston and Maine R. R. Co.*, 1 Gray, 263; *Sawyer v. Joslin*, 20 Vt. 172; *Farmers and Mechanics' Bank v. Champ. Trans. Co.*, 23 id. 186; S. C., 18 id. 131, 16 id. 52; *Blumenthal v. Brainard*, 38 id. 402. The goods were delivered according to a well-known and established custom of railroad companies, and the plaintiffs were bound to take notice of such custom. *Farmers and Mechanics' Bank v. Champ. Trans. Co.*, *supra*; *Van Santvoord v. St. John*, 6 Hill, 157; Redfield on Carriers, §§ 220, 221. The goods were delivered to the very party to whom they were sent, the only J. F. Roberts there was, and defendants fulfilled their contract. The plaintiffs having put it in the power of Collins to deceive, the defendants must abide the consequences of the fraud. Story on Agency, § 127; *Goodman v. Eastman*, 4 N. H. 455; *Putnam v. Sullivan*, 4 Mass. 45; *Thurston v. McKown*, 6 id. 428; *Storer v. Logan*, 9 id. 55; *Lickbarrow v. Mason*, 2 T. R. 70.

Field & Tyler, for plaintiffs.

STEELE, J. I. The defendants claim that this action should have been brought against them as warehousemen, and not as carriers. This objection need not be considered, unless from the facts it appears that the responsibility of the defendants as carriers had ceased and the new relation of warehousemen had been assumed before the time of the loss of the goods by alleged misdelivery. If the loss of the goods occurred while the defendants stood in respect to them under the responsibility of carriers, the action can clearly be sustained against them as carriers if it can be sustained at all. It is true, the transit of the goods had ended before the alleged misdelivery, but the defendants' relation as carriers did not end at the same time. The responsibility of the carrier, as such, continues

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after the goods have reached their destination, until the party entitled to them has had a reasonable time to call for, examine, and take them. *Blumenthals v. Brainard*, 38 Vt. 402. It appears that the misdelivery and loss here complained of occurred before the expiration of such reasonable time. Collins was in Boston awaiting the arrival of the goods, and when they arrived sent for and took them. If, therefore, the defendants are liable in any action by the reason of the delivery of the goods to Collins, they are liable in this action, which proceeds against them as carriers.

II. It is urged that the defendants cannot, even as carriers, be held liable for delivering the goods to the wrong party, if they deliver them in the customary manner and in the usual course of business. We think no such exception to the common-law rule can be made. The carrier is under the same contract, obligation or duty to deliver the goods safely that he is to carry them safely. The law fixes these duties upon the carrier, and he cannot relieve himself from them by proving his usage. It is true, as urged, that it is not as customary for other carriers as it is for express carriers to obligate themselves to look up the owner and consign and deliver the goods to him at his residence or place of business. But all classes of common carriers are responsible, and equally responsible, for a loss of the goods by a delivery of them to the wrong person. *Stephenson v. Hart et al.*, 4 Bing. 476 (13 E. C. L. 596); *Duff v. Budd*, 3 Brod. & Bing. 177 (7 E. C. L. 671); *Fletcher v. Am. Ex. Co.*, Am. Law Reg. November, 1866.

III. In this case there was an error on the part of the plaintiffs in the direction of the goods. They were directed to J. F. Roberts, Roxbury, Mass. There was no such person as J. F. Roberts, and no person who was known or passed by that name. Collins, whom the plaintiffs well knew as Collins, had represented that there was such a person as J. F. Roberts, in Roxbury, and had induced the plaintiffs to consign the goods to that address. Collins then went to Boston, and awaited the arrival of the goods, and claimed them under the name of J. F. Roberts, which name he assumed for the purpose of getting the goods. The swindle was successful. What should be the effect, upon the measure of the defendants' responsibility, of the plaintiffs' error in directing the goods to a fictitious address? This might be an important question if the error had misled the defendants, and occasioned them to deliver the goods to the wrong party after they had used that care and precaution which

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would be reasonable in such matters. But this error in the direction could not excuse the defendants from the duty of exercising at least ordinary care in the delivery of the property. They did exercise no such care. They were guilty of actual negligence. They delivered the goods to an employee of a truckman, upon his mere statement that Roberts sent for them. Any other man in Boston could have obtained them just as easily. The swindler Collins was not known as Roberts, and if he had been required to identify himself as Roberts, might never have attempted it, and if he had, it would have been likely to lead to the detection of the fraud. If, therefore, the delivery of the goods to Collins through his agent was a misdelivery, it was done under such circumstances of negligence as to make the defendants responsible, under the most favorable rule as to care which they could ask.

IV. But it is claimed that there was no misdelivery; that the goods were delivered to the very party to whom they were sent, the only J. F. Roberts there was, and that the defendants have therefore fulfilled their contract. To say that Collins was the only J. F. Roberts is to assume that he was J. F. Roberts, when in fact there was no such man, and Collins was not known by that name. It is not true that the goods were consigned to Collins. They were not so marked. They were not so intended. They were for J. F. Roberts. It does not follow, because there was no such man as Roberts, that they were for Collins. If there was no such man, then the goods were for the consignors. It is true, the swindler misled the plaintiffs into consigning the goods as they did, but the swindle did not convert Collins into Roberts, and the plaintiffs did not consign the goods to the swindler at all.

In the case of *Stephenson v. Hart*, cited above, the plaintiff, having been imposed upon by a swindler, consigned a box to J. West, 27 Great Winchester street, London. No such person resided there. The defendants, on learning that fact, held the box until they received a letter from the swindler or his confederate, signed "J. West," asking that the box should be sent to him at the "Pea Hen," a public house at St. Albans. The carriers sent the box as requested, and were held liable to the plaintiff for its value. In *Duff v. Budd, ubi supra*, the plaintiff, on an order from a stranger, consigned goods to "James Parker, High street, Oxford." There was no such man. But there was a W. Parker, of High street. The defendants, who were common carriers, offered the goods to W

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Parker. W. Parker said he expected no parcel. A person to whom the defendants had before delivered goods under the name of Parker called and claimed the parcel. It was delivered to him, and thus lost to the plaintiff. The value of the parcel was £89, and the defendants had given notice that they would be responsible for no more than £5 value, unless the value was marked on the package, which was not done in this case. The jury having given the plaintiffs a verdict against the carriers for the full value, it was held there was no error, BURROUGHS, J., remarking: "Carriers are constantly endeavoring to narrow their responsibility and creep out of their duties, and I am not singular in thinking that their endeavors ought not to be favored. The question here is, whether there was gross negligence. I think there was, and I am of opinion that the case was properly left to the jury, and that they have given a proper verdict."

The judgment of the county court is affirmed.

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CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

MEIGS' APPEAL.

(63 Pa. 22.)

Nature.

The question of fixture does not depend upon whether or not the foundation is let into the soil, but in the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act.

The United States erected in the borough of York, upon ground dedicated as a public common, buildings for use during the war. *Held*, that the circumstances showed that these buildings were intended for temporary use and not as permanent structures, and that the borough, by lying by and suffering them to be erected upon a public common where, as permanent structures, they would be nuisances, is estopped from declaring that the United States intended to annex their chattels to the freehold.

APPEAL from the court of common pleas of York county. In equity.

This proceeding was brought in 1866, by the borough of York, to restrain Montgomery C. Meigs, quartermaster-general of the United States, and others, from selling and removing certain buildings erected by the government, and used for barracks and hospitals during the war of the rebellion.

A portion of the buildings were erected in 1862, and from time to time additional buildings were put up, the whole being used during the continuance of the war and until August, 1865, when they were closed. They were not placed upon permanent founda-

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tions, but merely on posts, and built in the simplest and cheapest way, without cellars or chimneys, and without plastering.

The court below decided as follows:

"This case having been previously argued by counsel, the court is pressed for a decision to enable the parties to take the same to the supreme court, to be heard on the 3d day of May, at the time fixed for hearing the cases from the nineteenth judicial district. Without, therefore, examining the case, or preparing an opinion, but for the purpose of enabling the supreme court to decide it without any further delay, the court make this *pro forma* decree.

"And now, to wit, April 28, 1868, the court do adjudge and decree, that the said defendants have no right in law or equity to remove and carry away the buildings and materials in the said bill mentioned and described. And it is further decreed, that the said defendants, their servants, agents and alienees, be strictly enjoined to desist and abstain from such removal of said buildings, or the materials of which they are composed, and from intermeddling or interfering in any wise or in any manner with the use and enjoyment thereof by the said plaintiff."

Meigs appealed to the supreme court, and assigned the decree for error.

T. E. Cochran, for appellant.

J. S. Black, *M. S. Eichelberger*, and *J. L. Mayer*, for appellees:

The question of fixture depends upon whether it is let into the soil. This is the case of a trespasser erecting permanent buildings on another's land: he cannot remove them. The government could not take the land without compensation; besides, the right of eminent domain belongs to the state exclusively. That it was desirable, proper and convenient that the United States should have barracks and hospitals in time of war may be conceded; but it was not more necessary than that they should have clothes, guns, provisions, tents, munitions, etc. The rule, that private property cannot be taken without compensation, is the supreme necessity, and the "life of a nation" which habitually violates it is not worth saving. The taking or destruction of private property can be excused only when it is *absolutely* and *manifestly* necessary to meet some *immediate* danger, which can be averted in no other way, or to deprive the enemy of some *direct* advantage, which he would be sure to obtain. *Mitchell*

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v. Harmony, 13 How. 115. Estoppel exists only where the act is done under a color or belief of right. The complaint is not of what is past, but as to the future; the claim is, that an act should not be repeated in time of peace which even in war was without justification. The president or commander-in-chief could not confer authority on subordinates not warranted by law. *Little v. Barreme*, 2 Cranch, 179.

AGNEW, J. The plaintiffs' bill evidently proceeded on the ground of title. Its purpose was to restrain the agents of the United States from removing the buildings erected on the public common of York for military barracks and hospitals. These structures being put up by the United States, for military purposes, and built of their own materials, the title to the materials must have been lost to the United States, and vested in the plaintiffs, before an injunction would be issued to restrain their removal. Hence the plaintiffs assume, that, by the act of the United States, the buildings were annexed to the freehold; and thus the title to the materials passed out of them, and vested in the borough of York, as trustees of the title to the common. The buildings were chiefly set upon posts let into the ground, and, therefore, the argument of the plaintiffs maintains that the question of fixture or not a fixture depends, not on the character of the foundation, but always on the question whether it is let into the soil. This is the old notion of a physical attachment, which has long since been exploded in this state. On the contrary, the question of fixture or not depends on the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act. This subject has been so fully discussed in the recent case of *Hill v. Sewald*, 3 P. F. Smith, 271, it is unnecessary to repeat what is there said.

The true question then is, where these structures of the government incorporated into the reality? We think they were not, and this is manifested by the entire character of the transaction, and the attending circumstances. And, in the first place, it was not the intention of either party that they should be annexed to the freehold. Evidently the authorities of the borough of York cannot be presumed to have so intended. The grant from the proprietors of Springettsbury Manor to the burgesses and inhabitants of York of twenty acres of land was, "to be kept as an open common for

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ever for the use of said borough, and to and for no other use, intent or purpose whatsoever." The borough authorities had no power to assent to such erections, as permanent fixtures, and it was therefore clearly their duty to prevent their erection, if intended as such. Having made no objection and taken no steps to prevent it, they are entitled to the more favorable construction of their acts, that they knew and believed they were only temporary structures, for a casual purpose.

As to the United States, the emergency and all the acts and measures of the government show that these were not permanent buildings to be occupied at all times, but were mere temporary structures to be used during the continuance of the war, or so long only as the necessities of the government made this location convenient for military purposes. It is very evident the United States intended, no annexation to the freehold.

The nature and character of the structures are also to be considered. They were not improvements made for objects connected with the soil—neither intended to give value to it, nor to receive value from it. Their purpose was not different from that of the tents spread for the accommodation of the army, or its board huts used for winter quarters, the only real difference being, that these structures were intended for greater comfort, and a longer occupancy of the location.

The act is distinguishable from that of an ordinary trespasser. There was no intent to improve the ground, or to make it accessory to some business or employment. It was not an assertion of title in the soil, or of an intention to hold an adverse possession. Indeed, there was not a single element in the case which characterizes the act of a tort-feasor, who annexes his structure to the freehold, and is therefore presumed to intend to change the nature of his chattel and convert it into realty, and thereby to make a gift of it to the owner of the freehold. Neither the borough nor the United States looked upon the act in that light. The United States intended no dedication of the materials to the borough, and the borough expected none.

Herein it is, that, in equity, the same principles apply that lie at the root of an estoppel. It is not estoppel, in the ordinary sense, which prevents an owner from claiming his own property, because he has done that which shuts his mouth to declaring his title. These materials never were the property of the borough, and there-

fore; as owners, they had no title to be estopped of. But the borough, by lying by and suffering the United States to put up the structures without objection, on a public common, where, as permanent buildings, they would be nuisances, is estopped from declaring that the United States intended to annex their chattels to the freehold; from asserting that they were mere tort-feasors, to be treated as presumptively dedicating their property to the public. This, however, is the pivot on which the right to an injunction turns. The plaintiffs must convince us, that, in law and equity, the United States have lost their title, notwithstanding neither party intended there should be a gift of the chattels. They must stand in the attitude of one entitled in equity to appropriate these structures, and of whom it must be said, he has done nothing to mislead or to encourage a belief that he has assented to the act. A license to use the land of another, temporarily, may be inferred from circumstances. Thus, a neighbor who enters to pay a visit cannot be treated as a trespasser. So, a guest who enters an inn, or one who moors his vessel at a private wharf, to do business with the owner. And even a permanent right to the use of structures built on the land of another, with his assent, may be acquired by the expenditure of money and labor. *Lefevre v. Lefevre*, 4 S. & R. 241; *Rerick v. Kern*, 14 id. 267. And it is said in *Cook v. Stearns*, 11 Mass. 533: "Licenses to do a particular act do not in any degree trench on the policy of the law which requires that bargains respecting the title or interests in real estate shall be by deed or in writing. They amount to nothing more than *an excuse* for the act which *otherwise would be a trespass*." See, also, notes to *Rerick v. Kern*, 2 Am. Lead. Cases, 514. There is nothing in the case to show express license, but the circumstances bear strongly on the silence of the plaintiffs when they should have spoken out. The United States were engaged in a gigantic war, requiring all its means and the encouragement of all good citizens to suppress the opposition to their welfare and authority. Troops were constantly required to be raised and disciplined. York was within the theater of war, and needed protection, the enemy coming up to her very door. Battles were fought near by, and none more than the citizens of York needed that the government should use all the means and appliances of war to preserve their lives and property. Can it be tolerated, that now, when the enemy is defeated and war is no more, these citizens should claim the very property the government

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had used as part of the means necessary to their protection? If equity has a conscience, it must revolt at this return for the services thus rendered by the common government.

This is an application to a court of equity, to use the arm of the law to restrain an unlawful act, on the ground that the removal of these buildings is an irreparable injury. But surely this is not such a case. There is not any evidence that the United States have dedicated this property to the citizens of York, or that they have done any act which can justly forfeit their title to the property; and it is not the province of a court of equity to enforce penalties and forfeitures. It is not necessary to invoke the power of eminent domain in this case, or any doctrines of necessity, to override the rights of property. Equity will not interfere in such a case independently of these considerations.

The *pro forma* decree of the court below is reversed, and the plaintiffs' bill is dismissed at their costs.

MISHLER, appellant, v. THE COMMONWEALTH.

(62 Pa. 55.)

Criminal recognizance.

Where a recognizance for the appearance of a principal is joint, and not several the failure of the principal to appear is a breach of the condition, and it is not necessary to call upon the bail to produce the body of such principal.

Where the recognizance has been forfeited by a breach of its condition the forfeiture is not rendered invalid by a subsequent respite of the recognizance.

Where the condition of the recognizance is, that a prisoner shall appear and not depart the court without leave, the mere appearance of the prisoner, and then departure without leave, does not release the surety. It is at all times in the discretion of the court, at any stage of a criminal trial, to call the defendant and forfeit his recognizance.

ERROR to court of common pleas of Lancaster county.

This is an action upon a forfeited recognizance. The facts appear sufficiently in the opinion. Verdict and judgment below were in favor of the commonwealth.

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A. H. Hood, J. Heister, and J. B. Amwake, for plaintiff in error:

The record should show all the facts, to authorize the entry of forfeiture. *Rhoads v. Commonwealth*, 3 Harris, 272; *Bushler v. Buffington*, 7 Wright, 278. Respiting the principal was a discharge of the bail. *Keefhaver v. Commonwealth*, 2 Penn. 244; act of July 30, 1842, § 26; Pamph. L. 465; Purd. 479, pl. 16. The evidence offered did not contradict the record; it merely was what might have gone on the record; *ex æquo et bono*, it was a good defense, and ought to have been received. *Shoemaker v. Ballard*, 3 Harris, 94; *Hoffman v. Coster*, 2 Whart. 468; Hawk. P. O., book 2, ch. 15, § 84. If there was a spark of evidence it should have been received. *Bank of Pittsburg v. Whitehead*, 10 Watts, 402. The verdict was final, and could not be altered. *Walters v. Junkins*, 16 S. & R. 414; *Reitenbaugh v. Ludwick*, 7 Casey, 141.

W. A. Atlee, J. Landis, and J. Porter, for defendant in error.

SHARSWOOD, J. This was an action of debt upon a forfeited recognizance in the quarter sessions. The defendant below was the bail of Lewis Suter, and pleaded *nul tiel record*, and a special plea that the condition of the recognizance was performed by Lewis Suter appearing, and that the said recognizance was not lawfully forfeited as to Isaac Mishler, the plaintiff in error. To this a replication, traversing the averments of the plea, was filed by the commonwealth, tendering an issue to the contrary.

The first assignment of error is, that the court erred in entering judgment for the plaintiff on the plea of *nul tiel record*. The reasons specified in the assignment are, that there was no record showing that the recognizance was ever forfeited as to Isaac Mishler, or that the said Isaac Mishler ever consented that the same should be respited.

The recognizance upon which the suit was brought was a joint obligation, upon condition that Suter should appear at the next court of quarter sessions, then and there to answer such things as should be objected against him on behalf of the commonwealth, and not depart said court without leave. The record showed that a true bill was found, and, on the 16th of April, 1867, the trial was continued to May 27, 1867. On the following day, Lewis Suter being called three times in open court, and failing to answer, the recognizance was forfeited, and respited to May 27, 1867. On May 27,

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1867, the recognizance was again respited, by order of the court, to August sessions following, when, Lewis Suter being again called three times and failing to answer, the recognizance was forfeited absolutely. The objection is, that the record does not show that Isaac Mishler, the bail, was called three times. Usually, recognizances of this nature are in form several, not joint. Binns' Just. 139. When this is so, it would seem to be necessary that each recognizance should be separately forfeited in the usual and solemn manner. The bail should be called three times to bring forth the body of the principal whom he undertook to have there that day, or forfeit his recognizance. Upon an entry of forfeiture as to each, it would be conclusively presumed that this form had been pursued. But this obligation being joint, and not several, the failure of Suter to appear and answer when called was a breach of the condition. Nor was this forfeiture rendered invalid by the subsequent respite of the recognizance, first to another day in the same term, and then to the following August sessions. The liability of the cosurers was fixed absolutely, and the respite was merely an order that the forfeiture should not be estreated for a certain period. It is a power which has been always exercised; is recognized by the 26th section of the act of July 30, 1842 (Pamph. L. 455); and seems essential to the administration of justice in mercy. A respite is a temporary suspension of the execution of a sentence—a delay, forbearance, or continuation of time. Bouv. Law Dict.; Whart. Law Lexicon. It is true, that, in *Keefhaver v. The Commonwealth*, 2 Penn. 244, Chief Justice GIBSON states the practice to be, to do this with the consent of the bail, in order to avoid the trouble of renewing the security; but that was a case in which the defendant had appeared, been tried and acquitted, and the jury having determined that she should pay the costs, there was no forfeiture of the recognizance until the following term. He was evidently speaking, therefore, of a respite of a recognizance before forfeiture. In such case, the condition of the recognizance having been complied with, as far as the bail was concerned, by the appearance and trial of defendant, which was, in effect, a surrender, the obligation was gone. But it is a very different case when the condition has been broken. It is not easy to perceive upon what principle mere indulgence thus accorded to the principal should discharge the bail. It is entirely for his benefit; for it cannot be doubted, that, if the principal should surrender himself, and stand his trial at the term to which the case was continued, the

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court of common pleas would remit the forfeiture, as they are authorized to do by the second section of the act of December 9, 1782 (2 Smith, 84), according to equity and their legal discretion.

The second assignment of error involves substantially the same question as the first; for if the recognizance was forfeited as to Mishler by the failure of Suter to appear according to its terms, there was no variance between the certificate of the clerk of quarter sessions given in evidence and the declaration.

The third assignment of error is, that the court erred in rejecting the evidence of Mr. Reynolds, one of the counsel of Suter, offered to prove that Suter was in court at the sessions to which he was bound to appear, and that the case was continued on his application; that he was discharged, and, by arrangement, the recognizance forfeited and respite until a subsequent day. So far as the offer was to show an express discharge, it contradicted the record. That the forfeiture of the recognizance was by arrangement was immaterial. The fact, however, that the case was continued before the forfeiture, appears by the record; and, although the parol evidence thus offered was irrelevant and inadmissible, being either merely confirmatory of the record or contradicting it, yet it is proper to consider, in connection with the fifth assignment of error, that the court instructed the jury to bring in a verdict for the plaintiff, whether the continuance of the case necessarily implied that the defendant had leave to depart the court. The mere appearance of a defendant, and then departing without such leave, clearly does not release the surety. *Commonwealth v. Coleman*, 2 Met. (Ky.) 382; *Starr v. Commonwealth*, 7 Dana, 243; *The State v. Gorley*, 2 Clarke (Iowa), 57; *Humphrey v. Kasson*, 26 Vt. 760. It is the express condition of the recognizance that he shall appear and not depart the court without leave. It is at all times in the discretion of the court, at any stage of a criminal trial, to call the defendant and forfeit his recognizance. *The People v. Petry*, 2 Hilt. 523; *The People v. Blankman*, 17 Wend. 252; *Gildersleeve v. The People*, 6 Barb. 35; *Wilson v. The State*, 6 Blackf. 212; *The State v. Stout*, 6 Halst. 125. Upon the continuance of the case, it is the duty of the court to have the recognizance renewed or a new one taken, or otherwise to commit the defendant to jail. The surety has bound himself only for his appearance at the next term, and his obligation does not extend to any subsequent term to which the case may be continued without his express consent. *Keefhaver v. The Commonwealth*, 2 Penn. 240; *Kisser v. The State*, 13 Ind. 30;

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The People v. Clery, 17 Wend. 374. If, then, a continuance of the cause is itself an implied leave to depart, all that a defendant has to do is to leave the court as soon as the order for a continuance is made. The order for the renewal of the recognizance necessarily follows the order for the continuance. The very question we are now considering has been decided by the supreme court of the state of Ohio in *Swank v. The State*, 3 Ohio (N. S.) 429. "The continuance of the cause for trial to the next term," say the court, "has nothing to do with the proper mode of securing the attendance of the prisoner at that term. Indeed, until the continuation takes place, upon the motion of the state or prisoner, it cannot be known that the attendance of the prisoner will be required at the next term, and no recognizance could be required of him to appear at a subsequent time. It is the continuance which creates the necessity of the new recognizance."

The fourth assignment of error is, that the court erred in refusing to allow the record to be amended according to the facts. The court below thought, that, on the evidence presented by the bail, they would not be warranted in allowing the amendment, and it is very clear that their decision is not the subject of review in this court. *Rhoads v. The Commonwealth*, 3 Harris, 277.

The fifth assignment we have already considered. The sixth is, that the court erred in calling back the jury after they had rendered a general verdict for the commonwealth, and been discharged, and allowing them to amend their verdict by finding the amount of the penalty of the recognizance. This was certainly an irregular and erroneous proceeding; but it was an error which did the defendant below no harm. Upon the plea of *nul tiel record*, and a general verdict for the commonwealth, the court were fully authorized to enter the judgment for the amount of the penalty, which they did.

Judgment affirmed.

GYGER'S APPEAL.

(88 Pa. 73.)

MUSSELMAN'S APPEAL.

(88 Pa. 81.)

Interest on accounts between partners — Good-will.

In the settlement of partnership accounts between partners, there is no general rule as to interest, but the allowance or refusal thereof depends upon the circumstances of each case.

A partner who is appointed by a firm to settle up the business of the firm after dissolution, and who continues the business of the firm upon his own account, is not liable to account to the firm for the value of the "good-will" thereof.

Exclusive right in the business and sole ownership of it as against others are the criteria of property in good-will.

APPEALS from the court of common pleas, Lancaster county. In equity.

This was an action for an accounting. The bill was filed in 1865 by Henry Musselman and Joseph Clarkson, against John Gyger. The facts as they appear in the master's reports show, that, in March, 1856, John Gyger, Henry Musselman, David Bair and Benjamin Eahleman, entered into partnership by written articles, wherein it was agreed to establish a partnership for three years, from March 24, 1856. Besides the ordinary stipulations, it was agreed that neither partner should sell his interest without the consent of all the others, but, if one withdrew without such consent, he should receive his interest in the firm, to be determined by referees chosen as therein provided. By articles of April 9th, 1859, it was agreed that the partnership should be continued under the original terms until July 2d, 1859, with the stipulation that at that date "the said banking business, good-will and all the privileges which the said firm enjoys, pass over to John Gyger. And we, each for himself, his heirs, executors and administrators, assign and transfer his or their right and interest in the said business on July 2d, 1859, to John Gyger, his heirs and assigns; provided, that the said John Gyger render unto us, from time to time, a just and true account of the settlement by him of all the liabilities and assets of said firm,

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as the books, papers and accounts of said firm set forth on July 2d, next; provided further, that in case of the decease of John Gyger before the business is finally settled, the surviving partner or partners shall finally close and settle the same."

The partnership was dissolved July 2d, 1859, and Gyger immediately, and in accordance with the agreement, took possession of the banking-house and the assets of the firm, and also commenced banking on his own account, under the old firm name, and so continued until May 4th, 1864, when the First National Bank of Lancaster was established, and rented the banking-house, and during all that time he was engaged in settling the affairs of the old firm, using the banking-house for that purpose; the assets of the old firm were \$264,550.11, of which \$31,757.45 were bills protested, about \$25,000 of which could not possibly be realized, and much of that collectible only by suit, and \$15,285.77 were real estate; the amount of expenses, including salaries of clerks in conducting the business of the settlement, rent, etc., with which the old firm should be charged, was \$2,102.29; the rent of the banking-house, *including* the amount chargeable to the old firm, was \$800 per annum; all the assets were collected but \$962.49.

On the 6th of August, 1860, Bair sold his interest to Joseph Clarkson.

The business was closed, not only without loss, but with some profit. Out of that profit, Gyger paid to Eshleman and Musselman, partners, and Clarkson, transferee of Bair, the remaining partner, each the sum of \$1,000.

The case was referred to a master, who found that the defendant Gyger was liable to account for rent at the rate of \$600 per annum, excluding the amount chargeable to the old firm; that he was not liable to account for the good-will; that he was chargeable with profits made during the continuing of the business after dissolution, and fixed the amount of profits at \$200; that there were to be allowed, for counsel fees, clerks' salaries, etc., rent, etc., \$2,102.29, as above stated; this included salary to Joseph Clarkson, plaintiff, who had been employed as clerk; that he was not entitled to compensation "for merely winding up the business of the old firm," but was entitled to compensation for conducting the business of the firm after dissolution, and fixed the sum at \$100.

He then stated an account, in which, among other things, he made charges and allowances in accordance with the foregoing

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decisions, and charged the defendant, besides, with "interest on balance (\$3,598.79) due to old firm, from May 1, 1865, to December 10, 1868, \$801.40; interest on rent of banking-room (\$2,900), as it fell due, up to December 10, 1868, \$777.19." He also allowed "interest on balance due to John Gyger, \$219.82." The account showed a balance of \$8,177.38, due by the defendant to firm; and the master awarded \$2,044.34½ as the share of each partner.

The defendant excepted to the report, in not allowing enough for expenses; in not allowing the defendant proper compensation; in charging him with rent and interest.

The plaintiffs excepted to the report, that the master had not charged against the defendant sufficient rent, nor the value of the good-will; that too much for expenses had been allowed to him; and that he had been allowed compensation for conducting the business after dissolution.

The court overruled the exceptions of both parties, and confirmed the report, from which both parties appeal.

O. J. Dickey and *J. E. Heister*, for Gyger, on the question of compensation, referred to Collyer on Partnership, § 328; *Bradley v. Chamberlin*, 16 Vt. 613; *Wilby v. Phinney*, 15 Mass. 120. On the subject of interest, Story on Partn. § 182; *Beacham v. Eckford*, 2 Sandf. Ch. 116; *Dexter v. Arnold*, 3 Mason, 284. On "good-will," Story on Partn. 99; *Williams v. Wilson*, 4 Sandf. Ch. 380; *Holden v. McMakin*, 1 Pars. 282. As to other points, *Hart v. Ten Eyck*, 2 Johns. Ch. 87, 88; *Ringgold v. Ringgold*, 1 Har. & Gill, 81, 82; *Davenport v. Davenport*, 1 Sim. Ch. 512; *Chew's Appeal*, 9 Wright, 230; *Beatty v. Wray*, 7 Harris, 516; *Brown v. McFarland*, 5 Wright, 129; Gow on Partn. 355.

R. W. Shenk and *D. G. Eshelman*, for Musselman, as to compensation, referred to *Beatty v. Wray*, 7 Harris, 516.

The opinion in *Gyger's Appeal* was delivered by

SHARSWOOD, J. The fifth assignment of error is, "in charging John Gyger interest prior to the settlement of accounts between the parties." Mr. Lindley remarks, that the principles upon which, in taking partnership accounts, interest is allowed or disallowed, do not appear to be well settled. 1 Lind. on Part. 649. In some cases it has been held, that the period of the dissolution of a partnership is

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the proper time to make a rest for this purpose. *Stoughton v. Lynch*, 2 Johns. Ch. 209; *Hollister v. Barkley*, 11 N. H. 501. Judge Story has laid down a different rule. "Interest," he says, "is not allowed upon partnership accounts generally, until after a balance is struck on a settlement between the partners, unless the parties have otherwise agreed or acted in their partnership concerns." *Dexter v. Arnold*, 3 Mason, 289. Vice-chancellor SANDFORD, of New York, in *Beacham v. Eckford*, 2 Sandf. Ch. 116, after a review of all the authorities, came to the conclusion that there is no general rule established, but that the allowance or refusal of interest depends upon the circumstances of each particular case. This seems much the safest principle to adopt, in view of the confidential relation of the parties, and the variety and complication of such accounts. No unbending rule could be laid down which would not, in particular instances, work great injustice.

[The remainder of this opinion, relating almost wholly to facts, is omitted.]

The opinion in *Musselman's Appeal* was delivered by

THOMPSON, O. J. We have considered all and every the exceptions of the appellants to the master's report, and decree of the court confirming it, and see nothing of which, we think, they have any just right to complain. We deem it unnecessary to examine, in detail, each of these exceptions, for, as to most of them, the master's report sufficiently vindicates the decree of the court.

The complaint that Gyger, the appellee, should have been charged for the "good-will" of the expired firm of John Gyger & Co., we think is without reason, under the circumstances of the case. It is true the agreement for dissolution, which extended the original period fixed for the dissolution of the firm for nearly three months, does say, that, on the 2d of July, 1859, the time at which the partnership is to expire, "the said banking business, good-will, and all the privileges which the said firm enjoys, [shall] pass over to John Gyger." By this agreement, Gyger became the liquidating partner of the firm; and he was consequently invested with the powers and privileges of the firm in settling up its business. No doubt if he had sold the "good-will," he would have been obliged to have accounted for the value received. But then he would have been obliged to have given up the place in which the liquidation was intended to be made. This we can see would have been greatly dis-

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advantageous to the liquidating firm. He continued there, and opened business as a broker for his own benefit, and through this channel was enabled so to nurse the assets of the firm as to pay all their debts, and realize a profit for the members of it. He evidently had the place for the purpose of liquidation, and for this purpose no good-will could be claimed. If his own business was benefited by the place as an established stand, the appellants' interests were also benefited by his business at that place, and in the manner in which it was managed. In equity, therefore, there was not a shadow of right in the claim for the good-will.

Nor at law was there any obligation on him to pay for the good-will. He did not agree to pay for it, and he did not sell it as such. Nor can I comprehend how it existed independently of the property. There was no relinquishment of business by the parties. Their business expired by its own limitation. They had no *exclusive* right in the business, that existed for a moment after the firm dissolved, or any sole ownership of it as against any others; and these are the *criteria* of property in good-will, according to the English rule. *Kennedy v. Lee*, 3 Meriv. 441; Coll. on Partn. 156; Story on Partn. § 99. But, supposing the rule to be more extensive by usage with us, and I think it is, how can there be a good-will of a business in favor of the members of a firm, where the firm has ceased by its own limitation, and no exclusive right to follow the business in that place belongs to them? In that case, as a distinct property, it is gone. It then attaches to and enhances the realty, and the value of it is realized in renting or selling that. Here the appellee is charged with the rental of the place (see *Gyger's Appeal*, just read), and in this was included, of course, all the advantages belonging to it as a site. Afterward he disposed of it by sale, as part of the assets of the firm, and in this way the members have realized the appreciated value occasioned by their business, if any.

Good-will is property in some circumstances. Such it was held to be, in *Williams v. Wilson & McClelland*, 4 Sandf. Oh. 479. There, two of the partners having been excluded by the wrongful act of a third, Vice-Chancellor SANDFORD decreed a dissolution, and sale of the lease for the unexpired term, together with the good-will of the business. That was unlike this case. There, the premises were leased for a business, and that business was relinquished by the decree before its expiration. The good-will existed in the members for several years to come, and was property, in which each had an

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interest, and as such was sold. This case illustrates the case in hand, and sustains our reasoning upon it. Without enlarging, we think the master and court were right in their views on this portion of the case, as well as in relation to the other matters complained of in this appeal.

WOLF, appellant, v. WESTERN UNION TELEGRAPH COMPANY.

(68 Pa. 63.)

Telegraph company — printed stipulations — limiting liability of.

A telegram, written upon a printed form containing certain terms, and subscribed by the sender, amounts to an agreement on the part of the sender that the telegram shall be sent according to such terms.

A condition, that a telegraph company "will not be liable for damages in any case, where the claim is not presented in writing sixty days after sending the message," is neither contrary to law, unreasonable, nor contrary to public policy.

ERROR to common pleas of Lancaster county.

The facts sufficiently appear in the opinion. The verdict below was in favor of the defendant (the telegraph company), under the direction of the court, from which plaintiff appeals.

W. R. Wilson and *A. M. Frantz*, for plaintiffs in error:

The defendants are liable, whether treated as common carriers, bailees for hire, or paid agents. Story on Bailments, § 489; *Hays v. Kennedy*, 5 Wright, 378; Story on Agency, § 217; *New Jersey R. R. Co. v. Kennard*, 9 Harris, 203; Act of March 29, 1849, § 15, pamph. L. 266; *Purd.* 959, pl. 1; *N. Y. & Wash. Tel. Co. v. Dryburg*, 11 Casey, 298; 2 Pars. on Cont. 173; Scott & Jarnagin on Telegraphs, §§ 242, 256; *U. S. Tel. Co. v. Wenger*, 5 P. F. Smith, 262. The conditions limiting liability of the defendants are not binding. *Birney v. N. Y. & Wash. Tel. Co.*, 18 Md. 341. The type stating the conditions were obscure. *Verner v. Sweitzer*, 8 Casey, 208; Angell on Carriers, §§ 247, 257, 267, 268, 275; *Camden & Amboy R. R. Co. v. Baldauf*, 4 Harris, 67; *Atwood v. Reliance Trans. Co.*, 9 Watts, 67; Scott & Jarnagin on Telegraphs, §§ 247, 248; *Beckman v. Shouse*, 5 Rawle, 179; *Clark v. Spence*, 10 Watts, 335. The company is

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liable for the negligence of their agents. *N. J. R. R. v. Kennard*, 9 Harris, 203.

D. G. Eshelman and D. W. Patterson, for defendants in error, cited *Farnham v. C. & A. R. R.*, 5 P. F. Smith, 53; *Bresse v. N. Y. & Wash. Tel. Co.*, 45 Barb. 274; Angell on Ins. §§ 225-228; *Inland Ins. & Dep. Co. v. Stauffer*, 9 Casey, 397; *Trask v. Ins. Co.*, 5 id. 198; *Lewis v. Gt. West. Railway*, 5 Hurl. & N. 867; *Beal v. South Devon Railway*, id. 883.

AGNEW, J. There seems to be but one question in this record. All the others were substantially ruled by the court below in favor of the plaintiffs. The court charged, that, under the last clause of the printed terms, the telegraph company was not liable, on the ground that the plaintiffs had not presented their claim for damages in writing within sixty days after sending the message. The message was written and signed by D. K. Wolf & Co., upon a printed blank, furnished by the telegraph company. The blank was headed, in large letters, "The Western Union Telegraph Company: all messages taken by this company subject to the following terms." Then came the terms, printed in small type. Next came the date, "Lancaster, October 23, 1866," and between it and the telegram were printed the words, "Send the following message, subject to above terms, which are agreed to." The message followed immediately, signed with the name of the plaintiffs' firm. This undoubtedly amounted to a written agreement by the plaintiffs to send their message according to the terms they thus subscribed. The question is, whether it is binding on them.

It is said in the agreement, that the knowledge of the plaintiffs of the terms is a fact which the court should have submitted to the jury. But no such question was made in the trial. Both parties in their written points, which appear to cover the whole ground of the case, took the fact for granted, by praying for instructions upon the effect of the paper. The plaintiffs themselves asked for no instruction on the ground of ignorance of the terms. It cannot be fairly urged, therefore, that the court took the fact from the jury; while there was no evidence that the plaintiffs were illiterate, or were imposed upon, or of any fact evidencing ignorance of the terms. The paper itself is not deceptive, for though the terms are printed in small type, the attention of the customer is drawn directly to

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them by the heading, and by the line printed between the date and the message itself. It is not the case of a mere notice, or of a ticket with limitations in small type, or so arranged as not to arrest attention. We cannot hold, therefore, that the court erred in saying that the plaintiffs having signed the conditions, it is therefore reasonable to presume that they were aware of them.

The last condition is in these words: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." This is the agreement of the plaintiffs, and is binding on them unless it is contrary to law, or is unreasonable and inconsistent with public policy. There is no statute infringed by it. It falls within none of the provisions of the acts of 29th March, 1849, and 14th April, 1851. *Brighly*, 959. It seems to be prohibited by no principle of the common law. Even common carriers, to whom the most stringent rules have been applied, may limit their liability by express contract, when it is not extended to cover their negligence of duty. *Farnham v. Camden and Amboy Railroad Co.*, 5 P. F. Smith, 53. But this condition has no relation to the duty of the telegraph company, its operation being confined to a duty to be performed by the employer before he can maintain his action for a neglect of the company's duty, to wit, to give notice of his claim within sixty days. Similar provisions in policies of insurance have been held to be good. *Inland Ins. Co. v. Stauffer*, 9 Casey, 397; *Trask v. Ins. Co.*, 5 id. 198.

Not being contrary to law, the contract contained in the condition falls within the legal maxim, *conventio vincit legem*, unless it be so unreasonable as to render it contrary to public policy, and therefore void. Though not wholly alike, telegraph companies and common carriers have some resemblance to each other in the public nature of the duties each performs. Hence the duties imposed upon them by the acts of 1849 and 1851, under the sanction of penalties. This public character of telegraph companies is adverted to in *The New York and W. Printing Tel. Co. v. Dryburg*, 11 Casey, 302, 303. In relation to the duties which concern the public, the unreasonableness of the rules adopted by these companies must, therefore, be scanned with an eye to their public policy. But, clearly, it is not unreasonable that a telegraph company should require notice of claims for its defaults within a reasonable time, before being held to answer for the alleged default. From the very nature of its business this may be essential to its protection against unfounded claims.

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These companies have often to wrestle with the elements themselves, in the storms which prostrate their lines or prevent their working, and are not to be held to a harsher rule than common carriers, who are excused by the act of God. Within sixty days the cause preventing the transmission of a message on a particular day might be easily ascertained and shown, which, after the lapse of several years, could not be discovered or proved. It is urged that the employer might not discover the failure to send his message forward within this time. How far this fact would displace the condition it is not proper now to say; but the reason is inapplicable to this case, where, from the nature of the message, its failure to reach its destination must be known, and was known, immediately by the employer. Another reason justifying the reasonableness of the provision for notice of the claim is found in the multitude of messages transmitted requiring a speedy knowledge of claims to enable the company to keep an account of its transactions, before, by reason of their great number, they cease to be within their recollection and control. If authority be needed, in addition to these reasons, it will be found in the case of *Lewis v. The Great Western Railway Co.*, 5 Hurl. & N. 867.

Judgment affirmed.

HOUSER, appellant, v. TULLY.

(22 Pa. 32.)

Innkeeper — liability of for of acts of servants.

An innkeeper's liability arises from the nature of his employment. He is bound to take all possible care of the goods of his guests, intrusted to him or his servants.

Where a guest deposits money on the credit of the inn, with a person acting as bar-keeper, the innkeeper is liable for its loss, and whether the deposit was made on such credit is a question for the jury.

APPEAL from court of common pleas from judgment in an action originally commenced in a justice's court.

The facts sufficiently appear in the opinion. Judgment below in favor of the plaintiff (Tully), from which defendant appealed.

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M. McLean, J. Gibson and W. McLean, for plaintiff in error:

Neither acts nor declarations of McClain are evidence of his agency. *Meredith v. Macoss*, 1 Yates, 200; *Plumsted v. Rudebach*, id. 502; *Stewartson v. Watts*, 8 Watts, 392. A master is not liable for the acts of his servant out of the scope of his authority. *Coleman v. Riches*, 16 Common Bench, 104. The innkeeper is not liable when the loss happens by the guest's misconduct. *Burgess v. Clements*, 4 M. & S. 306 (1 Sm. L. C. 198).

D. Wills, for defendant in error, cited *Calye's Case*, 8 Rep. 32 (1 Sm. L. C. 194); *Burgess v. Clements*, *supra*; *Kent v. Shuckard*, 2 Barn. & Ad. 803; *Bennet v. Mellor*, 5 Term, 273; *Yorke v. Grenough*, 2 Ld. Raym. 866; *Tewson v. Havre de Grace Bank*, 6 Har & Johns. 47; *Mason v. Thompson*, 9 Pick. 280; *Kisten v. Hildebrand*, 9 B. Monr. 72; *Thickstun v. Howard*, 3 Blackf. 535; *Sibley v. Aldrich*, 33 N. H. 553; *Armisted v. Weld*, 17 Ohio, 261; *Shaw v. Berry*, 31 Me. 228; *Pinkerton v. Woodward*, 33 Cal. 557; *Weisinger v. Taylor*, 1 Bush, 275; *McDonald v. Edgerton*, 5 Barb. S. C. 560; *Berkshire Woolen Co. v. Proctor*, 7 Oush. 417; *Taylor v. Monnat*, 4 Duer, 119; *Stanton v. Leland*, E. D. Smith, 89; *McDaniels v. Robinson*, 26 Vt. 317; *Coggs v. Bernard*, and notes, 1 Sm. L. C. (6th Am. ed.) 375, *et seq.*; Story on Bailments, §§ 471, 482; Jones on Bailm. 95; Story on Bailm. § 473; *Sneider v. Geiss*, 1 Yeates, 34.

The opinion of the court was delivered July 6, 1869, by

WILLIAMS, J. The defendant below kept a licensed tavern, and, in his absence, the plaintiff stopped at his house and remained over night. During the evening, while partially intoxicated, he handed to the person who was acting as bar-keeper a package of money for safe-keeping, which he locked up in the money drawer, and afterward embezzled. The defendant refused to make restitution, and the plaintiff brought this action to recover the amount of the deposit.

The court instructed the jury, that, if the plaintiff was not a guest at the inn, he was not entitled to recover. But, if he was a guest, and delivered his money for safe-keeping to one who had authority as bar-keeper to receive it, or who, if not the bar-keeper in fact, was acting in a capacity from which an authority to receive the money on the credit of the house might be inferred, he was entitled to recover, if he intrusted the money to him on the credit

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of the inn. But if he did not intrust the money to him in his capacity of bar-keeper, but on his individual credit and responsibility, for its safe-keeping, then he was not entitled to recover.

These were, in substance, the instructions which the court gave to the jury, in answer to the points submitted on both sides, and in the general charge; and, therefore, it will not be necessary to consider separately each assignment of error. Did the court, then, err in its instructions to the jury?

The liability of an innkeeper arises from the nature of his employment. He holds out a general invitation to travelers to come to his house, and he receives a reward for his hospitality. The law, in return, imposes on him corresponding duties, one of which is, to protect the property of those whom he receives as guests. *Clute v. Wiggins*, 14 Johns. 175. He is bound to take all possible care of the goods, money and baggage of his guests, deposited in his house, or intrusted to the care of his family or servants; and he is responsible for their acts, as well as for the acts of other guests. If the goods of the guest are damaged in the inn, or are stolen from it by the servants or domestics, or by a stranger guest, he is bound to make restitution; for it his duty to provide honest servants, and to exercise an exact vigilance over all persons coming into his house, as guests or otherwise. His responsibility extends to all his servants and domestics, and to all the goods and moneys of his guests which are placed within the inn; and he is bound, in every event, to pay for them, if stolen, unless they were stolen by a servant or companion of the guest. In case of loss by a theft, it is no excuse for the innkeeper that he was sick, or absent from home, at the time; for he is bound, in such cases, to provide honest and faithful servants, according to the confidence reposed in him by the public. These familiar principles require the citation of no authority for their support. They will be found more fully stated in any recent treatise on the law of bailment; and they fully justify the court in charging the jury, that, if the plaintiff was a guest, and deposited his money, on the credit of the inn, with a person having authority as bar-keeper to receive it, or who acted in such manner as would naturally lead guests to infer that he was the bar-keeper, the defendant is responsible for its embezzlement, and bound to make restitution. And the evidence was such as to justify the court in submitting both of these questions to the jury.

But, though an innkeeper is liable, on grounds of the soundest

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policy and public convenience, for whatever is deposited in his house by a guest, he is not responsible for the loss or embezzlement of his guest's money, where he does not deposit it on the security of the inn, but intrusts it to another guest or inmate for safe-keeping, in whom he reposes his trust and confidence. *Sneider v. Geiss*, 1 Yeates, 35. Whether the guest deposits his money on the credit of the inn or not, is a question of fact for the jury, and not a conclusion of law for the court; and was properly left to the jury under the evidence in this case. The loss of the money was not occasioned by the plaintiff's drunkenness, but by the dishonesty of the bar-keeper, who, after locking it up in the drawer, embezzled it. And, as the jury have found that he was acting as bar-keeper by the express or implied authority of the defendant, the plaintiff was guilty of no negligence in depositing it with him for safe keeping.

Judgment affirmed.

DAVIS and another, appellants, v. BIGLER, and another.

(62 Pa. 242.)

Vendor and purchaser — vendee retaining possession of chattels.

If a vendee allow a vendor to remain in possession, or, after a formal delivery immediately restore the possession to him, and he afterward sell and deliver the goods to a *bona fide* purchaser for value, without notice of the prior sale, such purchaser is entitled to the goods against the first vendee and all claiming under him.

This rule depends upon neither the statute 18 Eliz. ch. v, nor statute 27 Eliz. ch. iv, but upon the circumstance that the vendee, by suffering the vendor to remain in possession, enabled him to commit a fraud upon innocent third persons.

The rule of law, that the retention of possession of personal property is conclusive evidence of a colorable sale, is a rule of policy required for the prevention of fraud, and is to be inflexibly maintained.

ERROR to court of common pleas, Dauphin county.

Action of replevin to recover a raft of timber:

The plaintiff at the trial introduced evidence showing, that, in October, 1865, George Griffith, the owner of certain woodland, agreed to cut and deliver to one McMasters, at Smith's dam, on the Susquehannah, a raft of timber.

The timber was delivered to McMasters, who marked the same, and paid Griffith in full. McMasters subsequently sold the raft to plaintiffs, who marked it with their private mark. McMasters, in March, 1866, engaged Griffith to take the raft along the river to Marietta. In September, 1866, McMasters gave Griffith some expense money for running the raft, and agreed to meet him at another point and pay him the remainder due for that purpose. McMaster did not reach the appointed place at the time agreed upon, nor until after Griffith had left with the raft. Griffith did not deliver the raft at Marietta, but it was subsequently found in the possession of the defendants, who claimed to have bought it of one Dunlap.

According to the testimony of Griffith, who was a witness for the defendants, the raft had remained at a landing belonging to him until the time he sold it to the defendants, and that Dunlap had nothing to do with the sale.

The court below held, that if the timber belonged originally to Griffith, and McMasters, having bought it, left it in Griffith's possession, a subsequent sale by Griffith to the defendants, they acting in good faith and believing him to be the owner, would have the title on account of his having formerly owned the property and being intrusted with possession down to the time of the sale.

The verdict was for the defendants, and the plaintiffs appealed.

E. Snyder & B. F. Etter, for plaintiffs in error :

The continued possession in the vendor is but *prima facie*. *Edwards v. Harben*, 2 T. R. 587; *Kidd v. Rawlinson*, 2 Bos. & Pull. 59; *Armdell v. Phipps*, 10 Vesey, 145; *Martin v. Podger*, 2 W. Black. 701; *Eastwood v. Brown, Ry. & Moo.* 312; *Martindale v. Booth*, 3 Barn. & Adolph. 505; *Chase v. Ralston*, 6 Casey 539; *Morgan v. Biddle*, 1 Yeates, 3. The purchaser acquires no greater title than the seller. *McMahon v. Sloan*, 2 Jones, 229. Marking timber is evidence of delivery, and the buyer might contract with the seller to run it to market. Hilliard on Sales, 5, note b, 32; *Williams v. Merle*, 11 Wend. 80; *Covill v. Hill*, 4 Denio, 323; *Euston v. Worthing*, 5 S. & R. 130; *Lecky v. M'Dermot*, 8 id. 500; *Parsons v. Webb*, 8 Greenleaf, 38; *Lickbarrow v. Mason*, 2 T. R. 63.

L. B. & Hamilton Alricks, for defendants in error :

The sale to McMaster was fraudulent under statute 13 Elizabeth Roberts' Dig 294; *Olow v. Woods*, 5 S. & R. 278; *Barr v. Reitz*

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3 P. F. Smith 256; *Shaw v. Levy*, 17 S. & R. 99; *Lanfear v. Sumner*, 17 Mass. 110; *Jenkins v. Eichelberger*, *supra*; *Young v. McClure*, 2 W. & S. 147; *McBride v. McClelland*, 9 id. 94; *Mitchell v. Lucas*, 1 Wright, 187; *Mott v. McNiel*, 1 Aik. 162. No title passed till delivery. 1 P. F. Smith, 66.

SHARSWOOD, J. The main contest in the court below was upon questions of fact. The original owner of the raft, and his alleged vendee, were both examined as witnesses, the parties to the suit being purchasers from them respectively. Their testimony was conflicting upon the most important questions in issue—the fact of a sale and delivery, the retention of possession by the vendor if there was a sale, and the explanation of the marks on the logs. It is not the province of a court of error to review the verdict. The responsibility of that rests with the court before which the trial took place, and most wisely rests there; for they heard all the testimony from the lips of the witnesses, while all that is presented here are notes of the evidence, necessarily imperfect. It is our duty to dismiss from our minds all considerations arising upon the weight of the evidence, and confine ourselves to the errors of law alleged to have been committed, and which form the subject of the several assignments. These it is proposed to take up and examine, *seriatim*, in their order.

The first error assigned is, that the learned judge below instructed the jury that if “this timber formerly belonged to Griffith, and he sold it to McMasters, but an immediate contract was made to run it to market, and the raft was left in possession of Griffith, and lay on the landing hired by him until he started to run it to market, and he sold it on the way to the defendants, who bought it in good faith, without notice of the sale to McMasters, they will hold it.” That on the facts assumed in this instruction the law is correctly stated can hardly admit of a doubt. It is the doctrine of *Shaw v. Levy*, 17 S. & R. 99 — which remains unshaken in this state — that if a vendee allow a vendor to remain in possession or after a formal delivery immediately restore the possession to him, and he afterward sell and deliver the goods to a *bona fide* purchaser for value, without notice of the prior sale, such purchaser is entitled to the goods against the first vendee and all claiming under him. It would seem, however, to be a mistake to suppose that this rule depends either upon the statute of 13 Elizabeth, ch. v, or the statute 27 Elizabeth. ch. iv. The former of these statutes declared

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void all grants, as well of lands and tenements as of goods and chattels, made to delay, hinder or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs as against the parties entitled to the same. It is evident that subsequent purchasers are not within its purview. The statute 27 Elizabeth, ch. iv, for the protection of purchasers, is expressly confined to "all and every conveyance, grant, charge, lease, estate, incumbrance and limitation of use or uses of, in, or out of any lands, tenements or other hereditaments whatsoever." Roberts' Dig. pp. 295, 298. These statutes have been more than once declared by very high authority to be merely declaratory. "The principles and rules of the common law, as now universally known and understood," said Lord Mansfield, "are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Elizabeth, ch. v. and 27 Elizabeth, ch. iv." *Cadogan v. Kennett*, Cowp. 434; MARSHALL, C. J., in *Hamilton v. Russell*, 1 Cranch, 316 STORRY, J., in *Meeker v. Wilson*, 1 Gall. 423; 2 Kent Com. 515. The principle upon which *Shaw v. Levy* rests is this: that the vendee, by suffering the vendor to remain in possession (as to personal property the ordinary *indicium* of ownership), thereby enabled him to commit a fraud upon innocent third persons, and in a contest between them he must bear the loss who has been the cause of it. "I do not consider," said Mr. Justice ROGERS, "that this principle depends upon a secret trust between the original parties, but on public policy and the sound maxim of morality and law, that where one of two innocent persons must suffer, he who is the cause of the loss must bear it. Wherever there is a sale of property, and no actual possession delivered, it remains at the risk of the purchaser; as between him and the vendor the property is his, but when it passes into the hands of a *bona fide* purchaser without notice, it would be against sound policy to permit a recovery. The maxim *caveat emptor* does not apply." The same view has been advanced by the supreme court of Connecticut. The rule of law that the retention of possession of personal property is conclusive evidence of a colorable sale is a rule of policy required for the prevention of fraud, and is to be inflexibly maintained. Therefore, where a vendor of a horse within a week after the sale, hired him of the vendee and was using him, to all appearance, as his own, in the same manner as before the sale, it was held that it was a restoration of possession. *Webster v. Peck*, 31 Conn.

495. Wherever the owner of the goods stands by, and without objection allows another to treat them as his own, and a third person is thereby led to purchase them in good faith, he cannot recover from the purchaser, on the familiar principle of estoppel; and the same doctrine applies, although the party who allows another to assume the credit of ownership is not actually present when the act is done by which the third party is deceived. *Gregg v. Wells*, 10 Ad. & Ell. 90; *Thompson v. Blanchard*, 4 Comst. 303. In the every day transactions of life men are under the necessity of intrusting the possession of goods to servants and bailees for various purposes. The owner does not in such case lose his property by a breach of trust in the mandatory, where there is no sale in market overt. *Lecky v. McDermott*, 8 S. & R. 500; *King v. Richard*, 6 Whart. 422; *Rapp v. Palmer*, 3 Watts, 178; *McMahon v. Sloan*, 3 Jones, 231. Allowing a person, therefore, to have actual possession of chattels, unless there is some other fact connected with it, is not an act which holds him out to the public as owner or as authorized to sell it as his own. The doctrine of *caveat emptor*, as to any title the purchaser may acquire, applies. *Brown v. Wilmerding*, 5 Duer, 225. But when the possession remains in the original owner, or after a formal delivery it is restored without any notorious break in the continuity of it, under a secret understanding or agreement with him as servant, agent or bailee, this is an element which makes a very important difference in the case. That inquiry, which the party dealing with the possessor is bound to make, and which the law presumes him to make, leads him back to the original title, and thus his diligence will only avail to confirm the deception. The vendee, having acquired possession under his purchase, must have enjoyed it as long and in such a manner as to show that the delivery to him was not merely formal or colorable, before he can safely transfer it back to the vendor. *Breckenridge v. Anderson*, 3 J. J. Marshall, 714; *Jarvis v. Davis*, 14 B. Mon. 529; *Stevens v. Irwin*, 15 Cal. 503.

It is urged, however, that the error of the instruction complained of in this assignment consists in this: that it left out of view the fact in evidence that the vendee had resold to the plaintiffs, who had stamped the timber with their mark, and such being the case, it was competent for the original owner to have possession under a contract to run it to market, communicated to the new purchaser, and a sale by the bailee, under such circumstances, could in no manner affect the title of the plaintiffs. It might be enough to say, as to this

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suggestion, that if the law were as contended, it should have been embodied in a written point, and the specific instruction of the court upon it requested; for "it is hardly possible for any court to charge in such language as to comprehend every possible point of view in which the case might be put, or to notice every exception to the general rules of law. If the party wishes an explicit answer in relation to any particular point, it ought to be brought to the view of the court directly." SERGEANT, J., in *Churchman v. Smith*, 6 Whart. 152. That a mere omission of a judge to charge on a particular aspect of a case is not error when his attention is not called to it with a request so to charge, is the well-established law and practice of this court, as settled in a long line of cases, from *Churchman v. Smith*, to *Walker v. Humbert*, 5 P. F. Smith, 407. But even conceding, which the case indeed does not warrant, that the negative of such a proposition is fairly to be implied from the language of the learned judge, it is not easy to see upon what principle or reason the subsequent sale and marking could make any difference, the possession remaining all the while in the original owner. This was the hypothetical fact upon which this instruction was based, and whether the fact was so was left to the jury to say. Every sale subsequently made, even supposing the original owner to have been a party to it, was but a repetition of the first transaction, by which the vendor, being put in full possession under a secret contract, was thereby enabled to commit a fraud upon others. If the plaintiffs had been the hundredth in a regular line of succession as vendees, it would not in the least have strengthened their title. Every succeeding vendee leaving the original vendor in possession, stepped into the shoes of the first vendee; and of each one it may be predicated, that though he may himself be innocent, yet, as the cause of the loss sustained by another equally innocent party, he shall bear that loss.

The remainder of the opinion is devoted to facts and local statutes. On grounds other than stated above, the

Judgment was reversed and venire facias de novo awarded.

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COMMONWEALTH V. ERIE RAILWAY COMPANY — LAOKAWANNA
AND BLOOMSBURG R. R. COMPANY — MONONGAHELA NAVIGA-
TION COMPANY — CLEVELAND AND PITTSBURG R. R. COMPANY—
PHILADELPHIA AND READING R. R. COMPANY.

(62 Pa. 296.)

State taxes upon tonnage — constitutionality of.

In a case of simple doubt as to whether a state law conflicts with the federal constitution, or not, the decision of the state court should be in favor of the validity of the state law.

In entering into the federal union the states parted only with some of the sovereign powers, all the undelegated and unprohibited ones being reserved to the states or the people thereof.

Among the reserved state rights is that of eminent domain. Under this power railroads have been built, and the right to exact tolls and charges for their use is a necessary consequence of the power to construct them. This power may be exercised at the discretion of the state.

A tax levied upon railroads and transportation companies within the state generally at certain rates per ton upon all goods carried by them, and making no discrimination as to the source or destination of such goods, is not in conflict with the federal constitution.

Such a tax, although the amount is determined by the number of tons carried is not a tonnage tax. The tonnage of the federal constitution is one of capacity, not of weight.

Nor does it attempt to regulate commerce between the different states; nor does it impose a duty upon imports and exports.

The purpose of such a tax being to raise revenue, and not to regulate transportation, the right to impose it arises from the power to raise revenue, and not from a power to control commerce.

A state law must act directly as a regulation of commerce before it will be pronounced unconstitutional.

The state of Pennsylvania imposed, by act of April 30, 1864, a tax of from two to five cents per ton upon all the freight traffic of all railroad, canal, etc., companies doing business in the state. *Held*, that the act was a lawful exercise of state power over creations and uses brought into existence by her own authority, and a proper tax upon the franchises granted by her.

WRITS OF ERROR to court of common pleas of Dauphin county

The cases (five in number) arose under acts of the Pennsylvania legislature, passed in 1864, which provided, that, "in addition to

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the taxes now imposed by law, hereafter every railroad, steamboat, canal, slackwater navigation, or other transportation company, doing business within this commonwealth, shall * * * make quarterly returns * * * of the number of tons of freight traffic carried or moved by said company during the three months previous, * * * and shall pay the following taxes, to wit: 1st class, products of mines, two cents per ton; 2d, products of forests, animal or vegetable food, and all other agricultural products, three cents; 3d, upon merchandise, manufactures, and all other articles, five cents."

The section further provides, that, where the freight is carried over different continuous lines, the tax shall be paid by each company in proportion to the distance carried as may be adjusted among themselves, the state treasurer being authorized to collect the whole from any one of the companies.

The court below decided, substantially, that the act of the legislature was unconstitutional and void, to the extent that it imposes a tax upon freight other than that both received and delivered within the state of Pennsylvania, because the same conflicts with paragraph 4, section 8, article 1, of the constitution of the United States, giving to congress the power to regulate commerce with foreign nations and among the several states; and with paragraph 2, section 10, of article 1, of the constitution of the United States, which provides that no state shall, without the consent of congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

The commonwealth took a writ of error in each of the cases.

L. Waln Smith, deputy attorney-general, and *B. H. Brewster*, attorney-general, for the commonwealth:

This law is not a regulation of commerce. *Thurlow v. Massachusetts*, 5 How. 504 (license cases); *Smith v. Turner*, 7 id. 283 (passenger cases); *Nathan v. Louisiana*, 8 id. 73; *Almy v. California*, 24 id. 169; *Biddle v. Com.*, 13 S. & R. 408; *Penn. R. R. v. Commonwealth*, 3 Grant, 129; *State v. Delaware, Lack. & W. R. R.* 1 Vroom, 483; *State v. North*, 27 Mo. 464; *Paddleford v. Savannah*, 14 Geo. 483. The law is local in its operation; and, inasmuch as congress has not exercised its power in the premises, and has enacted no law with which this act conflicts, the same is constitutional. *Sturgess v. Crowninshield*, 4 Wheat. 122; *Gibbons v. Ogden*, 9 id. 1; *Houston v. Moore*, 5 id. 1; *Wilson v. Blackbird Marsh Co.*, 2 Pet.

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245; *New York v. Miln*, 11 id. 102; *Achison v. Huddleson*, 12 How. 293; *Cooley v. Wardens*, id. 319; *Hays v. Pacific Mail Steamship*, 17 id. 596; *Conway v. Taylor*, 8 Black, 603; *Haldeman v. Beckwith*, 4 McLean, 286; *Flanagan v. Philadelphia*, 6 Wright, 231; *Smith v. People*, 1 Park. Cr. 583; *Commonwealth v. New Bedford Bridge Co.*, 3 Gray, 339; *Lunham v. Lamphire*, 3 id. 272; *Freeholders v. State*, 4 Zab. 718; *Beall v. State*, 4 Blackf.; *Chittrers v. People*, 11 Mich. 43; *Port Warden v. Ship L. M. Ward*, 14 La. Ann.; *Commissioners v. Cuba*, 28 Ala. 185; *Newport v. Taylor*, 16 B. Mon. 699; *Mitchell v. Steelman*, 8 Cal. 363; *Smith v. Marsden*, 5 Texas, 432; *Erie R. R. Co. v. New Jersey*, 2 Am. Law Reg. (N. S.) 238. In the absence of the exercise of United States authority, the states may regulate navigable streams. *Woodman v. Kilbourns Man. Co.*, Am. Law Reg. (February, 1867) 241. The road of the defendants is not a highway of nature, but an artificial one, and the state might have refused to allow the same to cross its territory. Having permitted it to be built, its power of taxation over the same is unlimited, except so far as controlled by the terms of the grant to the company. *Passenger Cases*, *supra*; *Veazie v. Moore*, 14 How. 568; *Kelley v. Union Co.*, 12 Conn. 7; *Thames Bank v. Lovell*, 18 id. 500.

J. E. Gowen, J. C. Kunkel, R. A. Lamberton, and J. W. Simonton,
for defendants:

A tax imposed expressly on freight coming into and going out of the state would be a regulation of commerce. *Brown v. Maryland*, 12 Wheat. 419; *Gibbons v. Ogden*, 9 id. 189; *Passenger Cases*, *supra*; *Miln v. New York*, 11 Pet. 102; *Cooley v. Wardens*, 12 How. 311; *Steamship Co. v. Wardens*, 6 Wall. 31; *State v. North*, 27 Mo. 405; *State v. Kennedy*, 19 La. Ann. 397; *Erie Railway Co. v. State*, 2 Am. Law Reg. (N. S.) 238. The tax attempted to be imposed upon the transportation of freight destined for exportation beyond the limits of Pennsylvania is prohibited by the clause of the constitution which forbids any state laying imposts or duties on imports or exports. *Brown v. Maryland*, *supra*; *Almy v. California*, 24 How. 169; *Dobbins v. Commissioners of Erie*, 16 Pet. 435; *Bank of Commerce v. New York*, 2 Black, 620; *Penn. R. R. v. Commonwealth*, 3 Grant, 129. Commerce means intercourse with foreign nations and our sister states for the purpose of trade. *Corfield v. Coryell*, 4 Wash. C. C. 398; *Gibbons v. Ogden*; *Passenger Cases*, *supra*; *Groves v. Slaughter*, 15 Pet. 511. The power of congress to regulate com-

merce among the several states is exclusive of interference by the states. (*Groves v. Slaughter*, *supra*; *New York v. Milne*, *supra*; 2 Story on Const. § 1063; *State v. North*, 27 Mo. 464. Any tax or burden on articles of traffic carried from state to state is a regulation of commerce. *McCulloch v. Maryland*, 4 Wheat. 430. This act is a law regulating commerce. *Brown v. Maryland*, *supra*; *License Cases*, 5 How. 576; *Erie Railway v. New Jersey*, 31 N. J. 531; *Almy v. California*, *supra*; *Carson River Co. v. Patterson*, 33 Cal. 334; *Gibbons v. Ogden*, *supra*; *Brown v. Maryland*, *supra*; *People v. Donner*, 1 Cal. 169; *Brunnagen v. Tillinghast*, 18 id. 266; *People v. Raymond*, 34 id. 492; *State v. Kennedy*, *supra*.

The opinion of the court was delivered July 6, 1869, by

AGNEW, J. Although disagreeing with the learned judge of the court below in these cases, we must concede the ability with which he has handled the question in them. But a case of simple doubt should be resolved favorably to the state law, leaving the correction of the error, if it be one, to the federal judiciary. The presumption in favor of the acts of a co-ordinate branch of the state government, the relation of her courts to the state, and, above all, the necessity of preserving a financial system so vital to her welfare, demand this at our hands. When convinced that the state law is really repugnant to the federal constitution, we must yield to the supreme authority of the latter.

The question before us arises under the act of the legislature of Pennsylvania, approved August 25, 1864, entitled "An act to provide additional revenue for the use of the commonwealth." Pamph. L. 1864, p. 988. It is solely a revenue law; has no other purpose; and is, in substance, this: That the financial officers of all railroad, steamboat, canal, slackwater navigation, and transportation companies (excepting turnpike, plank-road and bridge companies), upon whose works freights are transported by themselves or others, for freight or tolls, shall make quarterly returns to the auditor-general, stating fully and particularly the number of tons of freight carried over or upon their works, and shall pay to the state treasurer, for the use of the commonwealth, a tax on each two thousand pounds of freight so carried, at rates designated in the act, and founded on a classification of the freights, so as to distinguish between the heavy and bulky and the lighter kinds, and thus to graduate the tax equitably, in order to meet the greater expense of transportation.

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The act also confines the tax upon freight carried over continuous lines by several companies to a single one, to be designated by the auditor-general, so as not to charge the tax twice on freights carried over the same line of improvements.

The corporations, defendants in the foregoing cases, dispute the validity of this tax, alleging that it is a regulation of commerce, or an impost act, beyond the power of the state. To solve the question, it will be proper to notice, first, the admitted relations between the federal and state governments. Upon the declaration of the independence of the colonies, in 1776, they became separate and sovereign states; the rights of the crown devolving upon them by revolution being confirmed to them by the treaty of peace. In entering into the federal union, they parted only with some of their sovereign powers, all the undelegated and unprohibited being reserved to the states, or to the people thereof. Amendments, Const. U. S., art 10; *McIlwaine v. Coxe*, 4 Cranch, 209; *Cohens v. Virginia*, 6 Wheat. 414; *Briscoe v. Bank of Kentucky*, 11 Pet. 258. Each government, state and federal, is sovereign within its own sphere. *Gibbons v. Ogden*, 9 Wheat. 1; *McCulloch v. Maryland*, 4 id. 316; *Bank U. S. v. Daniel*, 12 Pet. 33; *Bank Augusta v. Earle*, 13 id. 520; *Briscoe v. Bank of Kentucky*, *supra*; *Ohio L. Ins. Co. v. Debo*lt, 16 How. 428; *Dodge v. Woolsey*, 18 id. 349; *Ableman v. Booth*, 21 id. 506.

In speaking of "that immense mass of legislation which embraces every thing within the territory of a state not surrendered to the general government, all of which can be most advantageously exercised by the states themselves," Chief Justice MARSHALL says: "Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the *internal commerce* of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass." *Gibbons v. Ogden*. Among the most important reserved state rights, and one directly connected with the question before us, is that of eminent domain. This undoubted power has been exercised in the improvement of navigable streams, and in building and establishing ferries over them, and in the construction of roads, turnpikes, canals and railroads; and has been repeatedly recognized in authoritative decisions. Rivers: *Wilson v. Blackbird Creek Co.*, 2 Pet. 245; *Martin v. Waddell*, 16 id. 367; *Kelly v. Union Co.*, 12 Conn. 7; *Thames Bank v. Lovell*, 18 id. 500; *Veazie v. Moore*, 14 How. 568. Bridges: *Pennsylvania v. Wheeling Bridge*

Co., 18 id. 430; *Gilman v. Philadelphia*, 3 Wall. 713; *The Passaic Bridge*, id. 782; *Flanagan v. Philadelphia*, 6 Wright, 231. Ferries: *Conway v. Taylor*, 1 Black, 603; *Freeholders v. New Jersey*, 4 Zab. 713. Under this invaluable power the states have built up a network of railways and canals, and have improved natural channels through which the commerce of the whole Union is coursing, like the life blood throughout the natural system. This was not done under any supposed authority to regulate internal commerce, or to aid in the execution of the federal power over commerce between the states; but was done under the unquestioned power of the state to improve her own resources, and to regulate her internal affairs. Yet, does any one doubt the grand and beneficial impulse given to interstate commerce by this exercise of state power? And who can doubt that the state has a right to compensation for this expenditure of her means, and the benefit she has conferred on all who use her works? They were built by herself, or under her franchises, and the right to exact tolls, charges and fares for their use is a necessary consequence of her power to construct them. Nor does it make any difference what form her compensation takes—whether that of a direct charge on the tonnage using the road, or that of a tax on the corporations who use her franchises; her right is, to exact the compensation from those who use the works. To gainsay this is to deny her right of eminent domain, and her power to legislate upon her internal affairs and the creations of her own sovereignty. If those works were, as once some of them were, in her own hands, what provision in the federal constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to the pre-existing tolls and charges? To legislate once is not to exhaust her power over the subject of tolls or charges; but to legislate at all is to assert her power. Whether it be called a toll or tax, what is this but to increase a charge which she can rightfully demand? The right to demand any toll or charge upon all articles transported, or fares for passage, is derived from her grant, and the power to determine their extent depends on her discretion. It is a right of which she cannot be deprived, and of which she is the only judge, unless, perhaps, the power should be so unreasonably and oppressively exercised as to afford evidence of a design, by a fraudulent use of the power, to interdict or ruinously affect the

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commerce of other states. To say, because her citizens engage in mining for an extraterritorial market, or because merchandise may pass over these works out of or into the state, that, to exact tolls and charges for the minerals or merchandise transported over them, or to tax the franchises of those engaged in the work, is a regulation of commerce, is to confound all just distinctions, and to destroy the most sacred right of a state. Her power to levy revenue from transportation over these works may be seen in her power over the works themselves. If compensation were denied her by way of revenue, who can dispute her power to suffer her own works to fall into decay and ruin; or, when unfettered by a charter contract, to repeal the charters under which they were built? Interstate commerce might suffer; but what power could control the act? Then, on what principle is it she cannot levy a tax on these instrumentalities for the privileges granted, because the products carried are destined for points without, or from without to points within, the state? It is carriage, not destination, which gives the right of toll, tax, or charge. It is not levied on them because the products go out or come in, but because they have the privilege and the benefit of transportation. They are not arrested and forbidden to enter or leave the state till a charge is paid: that would be a duty on imports or exports, and a regulation of interstate commerce. They are not discriminated against, and required to pay more than others pay, because they go out of, or come into, the state: that would be a regulation and a tax on interstate commerce; but they pay, as all other products carried within the state pay, a charge for transportation — no more, no less, but the same exact freight paid by all others. The tax in this case is merely a charge upon the corporation for the freight carried over the road, levied equally on all, and rated equitably according to the character of the freight and the expense required to move it. It is clearly nothing but a tax on the business of the road, measured by the number of tons carried over it.

But the right to impose it does not rest solely on the ground of compensation for the use of works constructed under the eminent domain of the state, though this fact stamps the subject of taxation with its true character. Taxation is an independent power of the state, both fundamental and vital; and unlimited, except by the express prohibitions of the federal constitution, or by implication when it infringes directly on the exercise of federal power. "It is admitted," says C. J. MARSHALL, "that the power of taxing the peo-

ple and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it." "The sovereignty of the state" he says, "extends to every thing *which exists by its authority, or is introduced by its permission*, but does not extend to those *means* which are employed by congress to carry into execution powers conferred on that body by the people of the United States." *McCullough v. Maryland*, 4 Wheat. 316. These principles furnish a solution to the questions before us. The works over which this tonnage is transported owe their existence to the state. That which is transported is carried by the permission of the state, contained in the charters granted by the sovereign power. The business done upon them was the object and is the result of the exercise of that sovereignty. It bears no touch of the federal power. It is forbidden by no prohibition of state power. It owes its existence to no purpose, and no law of congress, and was not created to carry out any one of the powers of the Union. It being an undoubted creation of the state, and a subject of state sovereignty, it is therefore clearly within the state power of taxation. Hence it is immaterial how the subject of taxation is measured, by weight or by enumeration. The Pennsylvania ton of 2000 pounds is a convenient and equitable means of measuring the subject of the tax, and in ordinary speech it is called a tonnage tax, or a tax on weight. But it is not on this account to be confounded with the tonnage of capacity, forbidden by the federal constitution to be taxed by the state. And it is evident it does not matter whence or whither these tons travel, so that there be no discrimination, to forbid or to burden their entrance into or exit from the state, and being a tax on the benefit and the privilege of transportation on works constructed for this end, it bears equally on all. Nor can it make any difference, as we have already seen, that the company is allowed to add this tax on its franchises to the tolls or charges on the freight itself. It is the owner of the freight who enjoys both the privilege and the facility this valuable franchise affords, and whose toll could be increased by the state to the same extent if the works were in her hands. It falls upon those who use the road, not because it is a regulation of commerce, but because it is a subject of internal regulation, to which he is bound to contribute. There is in fact and in authority a substantial distinction between an act which simply operates as a burden on

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commerce and one which attempts to regulate it. No one can doubt the power of a state to tax her own coal, iron, lumber, grain and other products of her mines and soil, and the persons and occupations of those engaged in their production or their transportation, and yet these burdens eventually fall on those who consume them, whether they live in or out of the state. Clearly such taxation is no regulation of commerce. The state in laying a common tax on all such articles is not bound, and cannot be presumed, to know where they will be consumed, nor to inquire their destination of those who traffic in or transport them. If she do not discriminate between that which goes out or comes in, and that which remains within, it cannot be said that she in any sense attempts to regulate commerce with other states, or to impose a duty on imports or exports. In principle, where there is no discrimination, there is no difference between a tax on a transporter, whether in gross or measured by the tons he carries, and a tax on the farmer, the manufacturer, the miner, the merchant or the broker, measured by the business he does. Yet all the impositions are burdens which reach the consumer wherever he lives. The fallacy of the argument which insists that the burdens of internal transportation shall not be shared by the distant consumer, on the ground that it is an import or export duty, or a regulation of commerce, is seen in the fact that to exempt articles going out of the state would be to discriminate in favor of the foreign and against the domestic consumer. Coal carried from the mines to Richmond, on the Delaware, and there disposed of, is conceded to be liable to the tax, but if intended to be sent forward to places without the state, it is said not to be liable; what is this but to impose a tax on our own citizens, which those beyond the state are not to bear? Pennsylvanians are citizens of the same Union and entitled to its equal protection against such discrimination.

This leads to a more particular consideration of what is meant by a *regulation* of commerce. The subject was so thoroughly examined and stated by C. J. MARSHALL, in *Gibbons v. Ogden*, 9 Wheat. 1, that that case remains until this day as a landmark in the interpretation of the federal constitution. "Commerce," he says, "describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Again: "It is the power to regulate, that is, to prescribe the rules by which commerce is to be governed." This

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accords also with the root and definition of the word. "Regula, a rule—regulate, to adjust by rule—as to regulate weights and measures—to regulate the assize of bread—to regulate trade." Webster. Now, clearly this tax was not imposed or intended to be a rule to regulate traffic or intercourse, but was a simple measure of revenue. The purpose was not to regulate transportation, but to raise money for the support of government. This exercise of authority flows from the power to tax for revenue, not from a power to control commerce.

This distinction is very clearly stated by O. J. MARSHALL, in *Gibbons v. Ogden*, proving that the prohibition to lay imposts or duties on imports or exports, and a duty on tonnage, is an exception from the state power of *taxation*, and not from the power to regulate commerce. This tax being a revenue measure, and not a regulation of trade, is very clearly not a duty on exports or imports or on tonnage. "An impost, or duty on imports," says the same judge, "is a custom or tax levied on articles brought into a country." *Brown v. Maryland*, 12 Wheat. 419. The same definition will apply, *e converso*, to articles taken out as a duty on exports. That the tax in this case is not such a duty is manifest from what has been said. The law does not single out the freight going out or coming in and lay the tax accordingly. It is not a price paid for admission or departure. It meets the articles neither at the state line nor elsewhere with a license to be paid for entrance, exit, or sale. Nor is the tax a tonnage duty laid on vessels or the means of freightage necessary for the purpose of commerce to and from the state. It is simply a tax on internal carriage, not differing in principle from a tax on draymen, stage companies or other taxes on railroad and navigation companies, admitted to be lawful. *Tonnage duties* are duties laid on the carrying capacity of vessels, the only means or instruments of distant commerce known at the adoption of the constitution, though doubtless the principle is applicable to railroad tonnage as a means of external commerce. The early act of congress of July 20th, 1790, regulating tonnage duties, provides, that upon all ships or vessels which shall be entered in the United States, from any *foreign* port or place, there shall be paid the several and respective duties following. That is to say, etc. The act of March 2d, 1799, provided the rule for the measurement of the tonnage of each vessel. The nature of the subject, the legislation and practice of the government, and the well-known meaning

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of the terms used, render it clear that the tax in question is not a duty on exports or imports, or on tonnage.

That the positions taken in this opinion are sound is proved, I think, by the very cases cited as authorities against the tax. The grounds on which they are severally rested, as violations in each case of the prohibitory clauses of the constitution, or as specific restrictions upon commerce, and the recognition in nearly all of them of the power of the state to impose taxes on internal commerce, proves with clearness that the tax in this case falls within the scope of none of the cases.

Brown v. Maryland, 12 Wheat. 418, the case, perhaps, most relied on, bears no analogy in features or principles. The question, as stated by C. J. MARSHALL, was, "whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state before he shall be permitted to sell a bale or package so imported." It was held that this was a tax on imports and also a regulation of commerce, on the ground that sale is the object of importation, and a restraint upon it is a regulation of intercourse. Stress has been laid upon the illustrations used by the chief justice, in his argument against the power of a state to impose injurious burdens on commerce, as, for instance, to tax goods in transit through the state from port to port for the purpose of *re-exportation*, or articles passing through for the purpose of traffic, or the transportation of goods from the state itself to other states for commercial purposes. But the chief justice had reference to specific burdens. These subjects must not be singled out and taxed, for this would be discrimination affecting intercourse, invidious, and inviting retaliation from other states or foreign powers. He did not mean by these illustrations that those who use the artificial works constructed by the state, or under their franchise, might so do without compensation because they transported their goods on them for such purposes, or that they are not bound to share with our citizens the equal burden which is the price they must pay for availing themselves of these facilities. The entire opinion of C. J. MARSHALL in that case, and in *Gibbons v. Ogden*, shows that he never meant to carry the doctrine of federal intervention to such a wild length within the domain of the state. A full answer to such an argument is found in the recent tax cases, 5 Wall. 462 and 474, deciding that a law of congress gives no authority to carry on a business within a state forbidden by its laws. The chief justice

says, of the power of the state: "But very different considerations apply to the internal commerce or domestic trade of the state. Over this commerce congress has no power of regulation nor any direct control. This power belongs exclusively to the state." To these cases may be added the *License Cases*, 5 How. 504, supporting the state power to require a license to carry on a certain traffic in imported articles, even in the barrels or cases in which they had been imported.

McCullough v. Bank of Maryland, 4 Wheat. 316; *Weston v. City of Charleston*, 2 Pet. 449; *Dobbins v. County of Erie*, 16 id. 435; *Bank of Commerce v. City of New York*, 2 Black. 620. These cases need no comment, but to say that they rest on the ground that the state government cannot lay a tax on the constitutional means employed by the government of the union to execute its constitutional powers. Therefore, the loans, fiscal means and salaries of officers of the federal government cannot be taxed by the states, as they might be taxed out of existence. But even this protection has its limits, when these things become mingled in the mass of state property, as is evidenced by the *Bank Deposit Cases*, 6 Wall. 594, 611, which hold that deposits of savings institutions invested in United States securities are liable to taxation, notwithstanding the securities themselves are exempted; the tax being, in fact, on the franchise and not on the security. The analogy between that tax and the one before us is striking, the franchise being the subject, and the burden on property the effect.

The *Passenger Cases*, reported in 7 How. 283, have been largely cited from in the argument. From the strength and character of the dissents entered in them, it is difficult to determine the true value of these cases upon the points for which the views of the assenting and dissenting judges have been quoted. And it is not material, as the cases bear but little on the present question, while they illustrate the fact that a state law must operate directly as a regulation of commerce before it will be pronounced unconstitutional. In each of the cases the law was held invalid as a naked attempt to levy a tax on passengers from foreign ports, without any sufficient ground of state protection or service for which the tax could be exacted, and it was, therefore, not less a tax in effect, though not in form, on the vessel, and a regulation of commerce.

Hays v. Pacific Mail Steamship Company, 17 How. 596, is much the same in principle as the *Passenger Cases*. It was an attempt

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on the part of California to impose a tax on New York vessels in the port of San Francisco. The law was directly extraterritorial in its operation and an interference with the state commerce.

Almy v. California, 24 How. 169. California levied a stamp duty on bills of lading of gold exported from the state. The necessary connection between the bill of lading and the shipment made it essentially a duty on the gold exported. The case was put on the ground that the tax was a duty on exports, and not on the ground that it was a regulation of commerce. This case is valuable, because of the distinction between taxation and regulation, and of the fact that the opinion was delivered by TANEY, C. J., who had said in the *Passenger Cases*, 480, after citing C. J. MARSHALL on the same point: "I may, therefore, safely assume, that according to the true construction of the constitution, the power granted to congress to regulate commerce did not in any degree abridge the power of taxation in the states. They are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing the inspection laws, and also from laying any tonnage duty. *So far* their taxing power on commerce is restrained, *but no further*. They retain all the rest, and that the money demanded is a tax on commerce, or the instrument or vehicle of commerce, furnishes no objection to it, unless it is a duty on imports or tonnage, for they alone are forbidden."

The State v. North, 27 Miss. (6 Jones) 464, so much relied on, proves nothing to the point. It was a case of direct discrimination against the citizens of other states, founded on a statute of Missouri, requiring merchants to "pay an *ad valorem* tax equal to what is laid on real estate, upon all goods, wares and merchandise purchased by them, *except* such as may be the growth, produce or manufacture of the state, and *except* such unmanufactured articles as may be the growth and produce of other states. "It presented," said SCOTT, J., delivering the opinion of the court, "the question of the power of the state, in the exercise of the right of taxation, to *discriminate* between the products of this state and those manufactured in other states." It does not touch the present question, and one judge out of three dissented.

Erie Railway Company v. New Jersey, 4 Law Reg. 238, is a case of similar character to the last, and was decided upon a statute of New Jersey, imposing a transit duty on the corporations of *other* states laid on tonnage carried by them through New Jersey. The

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case fully concedes the power of a state to levy taxes which may incidentally affect interstate commerce, and places the invalidity of the tax on the ground of special discrimination. "This tax," said the chief justice, "falls on interstate commerce alone. It reaches no further. The burden is not on general business, one branch of which is the transportation of extraterritorial goods. On the contrary, the only business of the plaintiff which is *not* taxed, is the business of such company done entirely in New Jersey, and which does not consist of the transportation of merchandise from state to state. The law discriminates, and selects the transportation of commodities passing from state to state as the *peculiar* objects of the duty." He then proceeds to show the true character of such discriminating laws or regulations of interstate commerce, and their disastrous effects on the relations of states.

Steamship Company v. Port Wardens, 6 Wall. 31. This case has no bearing on the point before us. It was a bald attempt to levy a duty of five dollars on every vessel entering the port of New Orleans, in the form of a fee to the master and wardens of the port, "whether called on to perform any service or not." It was held to be both a tax on tonnage and a regulation of commerce.

I have not been able to have access to the nineteenth volume of Louisiana annual reports to examine the case of *The State v. Kennedy*. The quotation from it seems to have no special bearing on the case in hand. The last case is *Crandell v. Nevada*, 6 Wall. 35. Nevada enacted "that there shall be levied and collected a capitation tax of one dollar upon every person leaving the state by any railroad, stage-coach or other vehicle engaged or employed in the business of transporting passengers for hire," to be collected and paid by the carriers. A noticeable feature of this case is, that the repugnance of the state law to the federal constitution is denied to rest on the ground that it is a regulation of commerce in conflict with the federal law, and it is placed on the restriction of the constitutional right of all citizens freely to pass to the seat of government, the sea-ports, the public offices, and to other points on business with federal agents and in the federal service. But had it been laid on other grounds, still, like the Missouri and New Jersey cases, it was a clear case of discriminating against intercourse with other states, which, if admitted as a valid state power, could be carried to the point of interdiction by increased taxation.

I have deferred noticing the favorable case of the *Pennsylvania*

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Railroad Company v. Commonwealth, 3 Grant, 129, because of the alleged distinction, that the tonnage tax there is justified by the contract of the company found in its charter. But the decision was not rested on that ground; it was placed on the broad basis that the three-mill tax per ton is simply a mode of taxing the company according to the magnitude of the business, justified by the nature of the subject and the power of the state over it, and is not repugnant to the powers conferred upon congress, or the prohibitory clauses against laying duties on imports, exports or tonnage. Nor do I think that a contract relation helps the opposite argument. Let it once be conceded that the state law is, in fact, a regulation of interstate commerce, or imposes a tax on imports, exports or tonnage, in the sense of the federal constitution, and the contract relation will not justify it. The state cannot accomplish by contract what she cannot accomplish by law.

The act we are now considering is in no sense a regulation of commerce, or an attempt to tax interstate commerce. It is the lawful exercise of state power over creations and uses brought into existence by her own authority; a proper tax upon the use of the franchises granted by her for the benefit of all alike who employ them, and in consideration of valuable privileges and facilities furnished to them by her authority and permission. The subject is wholly internal, and the imposition equal in its operation and equitable in its distribution; while to exempt freight passing out or coming into the state from its operations would be unjust discrimination against our own citizens and in favor of the citizens of other states. The case is not rested on the debatable ground of state power to regulate interstate commerce in the absence of congressional legislation on the same subject, but on the admitted right of a state to execute its power of eminent domain in the construction of works for the transportation of freight and passengers, and to legislate and tax their use by those who choose to employ them, as undoubted subjects of her domestic affairs, and of that internal commerce which she can rightfully control so long as she does not fraudulently exercise her power to the injury of the citizens of other states.

For these reasons the judgments in all the cases are reversed, and a writ of *venire facias de novo* awarded in each case.

READ, J., dissented.

ELDER v. REEL.

(63 Pa. 308.)

Foreign divorce — dower.

It is settled, that the injured party in the marriage relation must seek redress in the forum of the defendant, unless such defendant has removed from what was before the common domicile of both.

When a court has not jurisdiction, notice or even process duly served cannot give vitality to the judgment.

At common law, adultery was no bar of dower, and, by the statute of Westminster (18 Edw. I, 1, c. 84), elopement or departure by the wife willingly from her husband, as well as adultery, is necessary to make the bar complete.

J. E., the husband of A. E., after marriage, removed to another state — A. E. not accompanying him. While there, he procured a divorce, on the ground of the adultery of A. E. Subsequently, he became seized of certain real estate in Pennsylvania, to which he returned, and married another woman. A portion of this estate was conveyed by him to J. R., who purchased in good faith and without knowledge of J. E.'s prior marriage — the second wife joining in the conveyance. In the mean time, A. E. was living and cohabiting with another man, claiming to be his wife. J. E.'s second wife having died, he became reconciled to A. E., and lived with her. Upon J. E.'s death, A. E. brought action for her dower in the real estate conveyed to J. R. *Held*, that she was entitled to dower, and that she was not estopped from claiming the same by reason of her acts and declarations, which could not have influenced J. R. in the purchase.

ERROR to court of common pleas of Dauphin county.

Action of dower, *unde nihil habet*.

John Elder married Amelia Dehart in 1841. The same year he removed to Tennessee, where he remained until 1853. His wife remained in Pennsylvania during all this time. In 1850 Elder procured in the Tennessee courts a divorce from her, on the ground of adultery. The proceedings were *ex parte*, the wife not being out of Pennsylvania during their pendency, and not appearing in any manner on them.

Elder became seized of certain real estate in Pennsylvania, upon the death of his father, in 1853. Returning to this state in that year, he lived a short time with his former wife, but in 1854 married another woman.

In 1856 he and his second wife joined in a deed to John Reel of a farm which had been part of Elder's father's estate. Reel supposed

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that the woman living with Elder, and joining in the conveyance, was his wife, and was ignorant of the circumstances of the prior marriage.

At that time, Amelia was living with a man named Pickel, in Philadelphia, as his wife, and, being prosecuted subsequently for adultery, averred that she was divorced from Elder, and, substantiating her statement, was discharged. Elder's second wife dying, he was reconciled to Amelia, and lived with her from 1857 until 1860, the time of his death. This action was brought to recover dower in the estate conveyed to Reel.

The judgment below was for the defendant, from which plaintiff appeals.

W. De Witt, for the plaintiff, cited on the subject of jurisdiction, *Bissell v. Briggs*, 9 Mass. 466; *Phelps v. Holker*, 1 Dal. 261; *Armstrong v. Carson's, Ex'rs*, 2 id. 302; *Benton v. Burgot*, 10 S. & R. 240; *Dorsey v. Dorsey*, 7 Watts, 350; *Steel v. Smith*, 7 W. & S. 450; *Bazley v. Linah*, 4 Harris, 241; *Rogers v. Burns*, 3 Casey, 527; *Bishop v. Bishop*, 6 id. 416; *Miltimore v. Miltimore*, 4 Wright, 159; *Colvin v. Reed*, 5 P. F. Smith, 375; *Hoffman v. Hoffman*, 55 Barb. N. Y.; *Flower v. Parker*, 3 Mason, 251; Story's Conflict of Laws, chap. 14, §§ 539, 543, 546; *Piquet v. Swan*, 3 Mason, 103; *Fenton v. Garlick*, 8 Johns. 194; *Dunn v. Dunn*, 4 Paige, 425; *Lyon v. Lyon*, 2 Gray, 367; *Arnold v. Tourtelet*, 13 Pick. 172; *Irby v. Wilson*, 1 Dev. & Bat. 568; *Borden v. Fitch*, 15 Johns. 121; *Mills v. Duryee*, 7 Cranch, 481.

As to forfeiture of dower by adultery. Thomas's Coke, 703, n.; *Green v. Harvey*, 3 Bacon's Abr. tit. *Dower*, p. 224; *Stegall v. Stegall*, 2 Brock. 258; 4 Kent's Com. 53; 1 Roper on Husband and Wife, 331; *Cogswell v. Tibbetts*, 3 N. H. 41; *Walters v. Jordan*, 13 Ired. 361; *Graham v. Law*, 6 Jones' U. C. O. 310; *Shaeffer v. Richardson's Adm'rs*, 27 Ind. 123; *Bell v. Nealy*, 1 Baileys (S. C.) 312; 1 Washburn on Real Prop. 227; Scribner on Dower, 498, § 2; 1 Bishop on Marriage and Divorce, 628; Coke's Lit. 33, n. 8; *Menville's Case*, 13 Coke, 23; Rolle's Abr. tit. *Dower*, 680; 1 Lilly's Abr. 669, tit. *Dower*, H.; Perkin's Con. tit. *Dower*, 155; *Harris v. Harris*, 4 Esp. 41; *Bateman v. Ross*, 1 Dow. 235; Park on Dower, 222; Clancy on Married Women, 201; 1 Roper on Husband and Wife, pt. 2, 559; 1 Brightly on Husband and Wife, 539; 1 Hil-liard on Real Prop. 101; 4 Kent, 53; 1 Washburn on Real Prop.

227; *Scribner on Dower*, 506; *Lakin v. Lakin*, 2 Allen, 45; *Bryan v. Bachseller*, 6 R. I. 546; *Lecompte v. Wash*, 9 Miss. 557; *Hollister v. Hollister*, 6 Barr. 449; *Nathan v. Nathan*, 2 Phila. 205.

L. B. & Hamilton Atricks, for defendant, cited as to jurisdiction, *Bishop v. Bishop*, 6 Casey, 416; *Rogers v. Rogers*, 15 B. Monroe, 364; *Dorsey v. Dorsey*, 7 Watts, 352; *Colvin v. Reed*, 5 P. F. Smith, 375; *Hart v. Texas*, 21 Wend. 40; *Miltimore v. Miltimore*, 4 Wright, 151; *Warrender v. Warrender*, 9 Bligh, 89; 2 Kent's Com. 117; *Mills v. Duryee*, 7 Cranch, 481; *Hollister v. Hollister*, 6 Barr. 451; *Green v. Green*, 11 Pick. 410; *Harteau v. Harteau*, 14 Pick. 181; *Harding v. Allen*, 9 Green, 140; *Tolen v. Tolen*, 2 Blackf. 407; *Hull v. Hull*, 2 Strobbh. Eq. 174; *Parsons on Cont.* 117, note; *Bishop on Marriage and Divorce*, 155.

SHARSWOOD, J. The only assignment of error which we shall consider, are the 2d, 3d and 4th. Those which remain are so clearly contrary to the rules of this court (6 Harris 578), that we must dismiss them on that ground. Fortunately, however, no injury results to the plaintiff in error, for the only questions which arise on the record are presented in the assignments, which are well made.

The first of these questions is as to the effect of the divorce *a vinculo matrimonii* decreed by the circuit court of Montgomery county, Tennessee. The court below instructed the jury as follows: "We are of the opinion that the divorce decreed by the court of Tennessee effectually destroyed the marriage contract between John and Amelia Elder." It is probable that the learned judge would not have so held, if, at the time of the trial below, *Colvin v. Reed*, 5 P. F. Smith, 375, had been reported, or the decision brought to his notice. That case rules this. It settles that the injured party in the marriage relation must seek redress in the *forum* of the defendant, unless where such defendant has removed from what was before the common domicile of both. "In a proceeding to dissolve a marriage," says AGNEW, J., "the parties stand upon a level of rights; when the injured party seeks a new domicile, and the domiciles are, therefore, actually different, there is no greater reason why the husband's new domicile should prevail over the wife's, than that hers should prevail over his. In this aspect, justice requires that neither should draw the other within the folds of a foreign jurisdiction." The rule thus established is so reasonable and fair that it must com-

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mend itself to every man's innate sense of justice; for, surely, it needs no argument to prove that no one, who has not shut himself out by his own voluntary act of flight from justice, should be condemned without a hearing or an opportunity to be heard. Nor did the evidence given of the notice of the pendency of the proceeding, admitting that it was served on the plaintiff, make any difference; for, in the language of the opinion in *Colvin v. Reed*, "back of it lies the want of power of the distant state to subject her to its jurisdiction." Clearly, when it is once determined that a court has not jurisdiction, notice, or even process duly served, cannot give vitality to the judgment it may pronounce. It is null and void, at least, as to any extraterritorial effect. Nor can it alter the case that the title to the land in which the plaintiff claimed her dower did not vest in John Elder until after the decree was pronounced. At the time it did so vest, the plaintiff was his lawful wife, and entitled to her dower, after his death, in any lands of which he might be seized at any time during the coverture.

The remaining questions arise from the following language of the charge, specified in the second assignment of error: "We are of the opinion, that, independent of the divorce, the plaintiff, by her course of conduct, is precluded from recovering dower in the present case, and your verdict should be in favor of the defendant." This instruction took every question of fact from the jury. In this, we think, there was error. Setting aside the Tennessee record, which, in this part of his charge, the judge excludes from consideration, so far from there being any conclusive evidence which would justify the court in withdrawing the case from the jury, it was all oral testimony, depending not only on the credit to be given to the witnesses, but on the construction to be put on their language. However clear and indisputable may be the proof, when it depends upon oral testimony, it is, nevertheless, the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial, if they should deem the verdict contrary to the weight of the evidence.

But, assuming the facts in evidence as all proved, we think the instruction would still be erroneous. It could only have been based upon one of two assumptions of law: either that the adultery proved to have been committed by the plaintiff was a legal bar to her action of dower, or that she was equitably estopped by her acts or declarations from setting up her claim against the defendant.

At common law, adultery was no bar of dower; for, says Lord Coke, "it is necessary that the marriage do continue, for, if that be dissolved, the dower ceases, *ubi nullum matrimonium, ibi nulla dos*. But this is to be understood where the husband and wife are divorced *a vinculo matrimonii*, as in case of precontract, consanguinity, affinity, etc., and not *a mensa et thoro*, only for adultery." Co. Litt. 32, a; 2 West. 435; Sir William Grant, in *Seagrave v. Seagrave*, 13 Ves. 443; *Bryan v. Bachseller*, 6 R. I. 546. But the law was changed, in this respect, by the statute of Westminster, 13 Edw. I, st. 1, c. 34 (Rob. Dig. 188), by which it was provided, "that, if a wife willingly leave her husband, and go away and continue with her avouterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly, and without coercion of the church, reconcile her and suffer her to dwell with him; in which case, she shall be restored to action." As well by the express words of this statute, as the uniform construction put upon it by the courts, elopement, or, perhaps, to speak more accurately, a voluntary separation, or departure, by the wife from her husband, as well as adultery, is necessary to make the bar complete. Co. Litt. 32, b; 2 Inst. 435. It is true that this elopement need not be with the adulterer; for, even where there has been a voluntary separation by mutual agreement, the statute applies. *Hethrington v. Graham*, 6 Bing. 135. It is still necessary, however, that she should have separated herself from him *sponste*—willingly. The provision of the statute is comprehended shortly, as Lord Coke tells us, in two hexameters:

Sponte virum mulier fugiens et adultera facta,
Dote sua careat, nisi sponsi sponste retracta.

Green v. Harvey, Roll. Abr. 680; Bacon's Abr., tit. *Dower*, F; *Stegall v. Stegall*, 2 Brock. 259; *Cogswell v. Tibbets*, 3 N. H. 41; *Shaffer v. Richardson*, 27 Ind. 122; *Walter v. Jordan*, 13 Ired. 361; *Bell v. Nealy*, 1 Bailey (S. C.) 312. Now, there was not only no evidence that the plaintiff had willingly left her husband, but the proof was direct, positive, and uncontradicted, that he had deserted her. He did not request her to go with him, nor even inform her of his intention. He left her clandestinely, on the false pretense that he was going a-gunning, and was absent for several years. His own crime of unfaithfulness to his marriage vows exposed her to seduction, and that she fell was as much his fault as hers. The

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industry and zeal of the plaintiff's counsel has found a case in point, decided in the common pleas of Upper Canada (*Graham v. Law*, 6 Jones, 310); but it required no authority to sustain so plain a position. This view renders it unnecessary to consider the effect of the evidence of final reconciliation between John Elder and the plaintiff, as it only could become important if the dower had been barred by force of the statute.

At the time, then, of the execution of the deed to the defendant for the land, the plaintiff was the lawful wife of John Elder, and had done nothing to bar her action of dower. Was there evidence of any thing which ought to work as an equitable estoppel to prevent her maintaining her claim against the defendant? The principle of equitable estoppel is well stated by Lord Chief Justice DENMAN, in *Pickard v. Sears*, 6 Ad. & Ell. 469, that, "when one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." *Commonwealth v. Moltz*, 10 Barr. 527. "Estoppels," says WOODWARD, J., "operate only between parties and privies; and the party who pleads an estoppel must be one who was adversely affected by the act which constitutes the estoppel." *Cuttle v. Brockway*, 8 Casey, 49; *Eldred v. Haslett, Administrator*, 9 id. 307. We must, therefore, confine our consideration of the acts and declarations of the plaintiff to such as had taken place prior to the conveyance to the defendant. We pass by the question, whether some evidence should not have been adduced to show that they were known to him and influenced his conduct. These facts were, simply, that the plaintiff had been living in adultery with, and had a child by, a man named Pickel, and that they passed as man and wife. This is the extent of the testimony of Shaeffer, the only witness who speaks as to a period prior to the deed. "I never heard them say they were married or not married," says he. Barbara Britenbaugh testifies, indeed, "she (the plaintiff) said they were married; they said they had a certificate of marriage. I only heard her say she had a certificate of marriage; said this when she first came." She first came to Campbellstown in the last of March or beginning of April, 1856, which was the only place where the witness knew them. This was after the date of the deed, which was February 2, 1856. These subsequent declarations could not estop the plaintiff; for, in the nature

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of things, they could not have influenced the defendant in his purchase, and, *a fortiori*, the proceedings before Justice Reed can have no such effect, for that proceeding was commenced as late as September 29, 1856. Upon the testimony, then, as returned with this bill of exceptions, it does not appear that there was any evidence to submit to the jury which ought to operate as an estoppel. That the defendant was a *bona fide* purchaser, without notice, sufficiently appears; and it is most probable that he was deceived into the belief that the woman with whom John Elder was then living, and who joined in the deed, was his lawful wife; but we see no evidence in the cause that any act or declaration of the plaintiff contributed to produce that deception. That it is no defense to an action of dower that the defendant is a *bona fide* purchaser, for value, without notice, is a point well settled by the authorities. 2 Scribner on Dower, 29, and the cases there cited.

Judgment reversed, and venire facias de novo awarded.

GREVMEYER V. SOUTHERN MUTUAL FIRE INSURANCE COMPANY.

(22 Pa. 240.)

Insurance by judgment creditor.

A judgment is a general and not a specific lien, and the judgment creditor has no insurable interest in specific property of his debtor.

ERROR to court of common pleas of York county.

Action upon a policy of insurance. The facts sufficiently appear in the opinion. Judgment below for defendant, from which plaintiff appeals.

T. E. Cochran and W. C. Chapman, for plaintiff.

E. H. Weiser and J. L. Mayer, for defendants.

THOMPSON, C. J. Four years after the plaintiff had effected an insurance on the property covered by the policy of the defendant, on which the suit was brought, he sold and conveyed it to a third

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party, one Donahoe, and, having received a portion of the purchase-money, took a judgment for the balance. Some months after this the property was destroyed by fire. Not having assigned the policy to the purchaser, he now claims to recover on it in satisfaction of his judgment, on the ground that, to that extent, he has an interest in the property sold and conveyed.

That there is material difference, especially in the law of insurance, between a mortgage and judgment is beyond question. The able argument of the counsel for the defendant in error, and the authorities cited by them, very clearly show this. In *Britton's Appeal*, 9 Wright, 172, STRONG, J., said: "They (mortgages) are in form defeasible sales, and, in substance, grants of specific security, or interest in land for the purpose of security. Ejectment may be maintained by a mortgagee, or he may hold possession on the footing of ownership, and with all its incidents."

That a mortgagee has an insurable interest on property is so well understood, that it would be a waste of time to cite authorities to prove it. Hence it is a very common thing to strengthen the security by insurance of the property for the benefit of the mortgagee. That its purpose is ordinarily a security does not destroy the legality of the insurance. The interest in the property pledged or mortgaged is co-extensive with the security it is to satisfy. Being a specific lien, no other property is answerable. It is, therefore, a specific pledge of definite property, and the mortgagee has, necessarily, an interest in it.

But a judgment is a general and not a specific lien. *Ruth's Appeal*, 4 P. F. Smith, 173. If there be personal property of the debtor, it is to be satisfied out of that. If there be not, then it is a lien on all his real estate without discrimination, and, hence, the plaintiff is not interested in the property as property, but only in his lien. As was said in *Coover v. Black*, 1 Barr. 493, the judgment creditor has neither *jus in re* nor *ad rem*, as regards the defendant's property. He has a lien, and the law gives a right to satisfaction out of the property, and that is all. For the same doctrine see *Reid's Appeal*, 11 Harr. 476, and *Conrad v. Atlantic Insurance Co.*, 1 Pet. 384. To these might be added citations of authorities almost without limit.

The result of all this is, that the plaintiff having sold and conveyed the property in question before its destruction by fire, taking only a judgment for the unpaid purchase-money, had no interest in

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the property when it was destroyed. That the judgment, being for purchase-money, did not draw after it a specific pledge of the land, as in case of a mortgage, is shown by *Ruth's Appeal, supra*. Like any other judgment, it was a general lien, and to be satisfied by execution of the personal property of the debtor first, and after that out of any other estate, as well as that for which it was given, to secure purchase-money.

This want of interest in the property was a complete answer to the plaintiff's action, and renders it unnecessary to consider other questions considered in the argument.

Judgment affirmed.

COMMONWEALTH V. GAMBLE

(23 Pa. 343.)

Constitutional law — Tenure of judicial office.

The Pennsylvania legislature established the twenty-ninth judicial district, by act of 28th February, 1868, under which act J. G. was elected and commissioned president judge of the district. By an act passed March 16th, 1869, the former act was repealed, and the district was abolished. *Held*, that the act of 1869 was invalid, as being an attempt, substantially, to abolish the office of president judge of the 29th district.

The term of the judicial office is fixed by the constitution, and it is beyond the power of the legislature to diminish it.

The powers, authority and jurisdiction of an office are inseparable from it. The legislature may diminish the aggregate amount of duties of a judge, by the division of his district, or otherwise, but must leave the authority and jurisdiction pertaining to the office intact.

QUO WARRANTO. Information filed to determine right of the defendant to the office of judge of common pleas. The facts appear sufficiently in the opinion. The decision (on a demurrer to the replication) below, was for the defendant, from which the commonwealth appealed.

Strong & Meredith, and *Black* for defendant.

S. G. Thompson and *B. H. Brewster*, attorney-general, for commonwealth.

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THOMPSON, C. J. On the 28th of February, 1868, Lycoming county being part of the eighth judicial district of the commonwealth, was, by act of assembly of that date, erected into a new district, to be called the twenty-ninth; and afterward, at the ensuing general election, the respondent, James Gamble, was duly elected, and subsequently commissioned, as president judge of the district, took the oath of office, and entered upon the performance of his duties as judge of the courts in it.

On the 16th of March, 1869, an act of assembly was passed and approved by the governor, repealing the above act creating the twenty-ninth district, transferring it to and constituting it part of the fourth judicial district, in which the Hon. Robert G. White is president, and Henry W. Williams is assistant law judge. The respondent, being of opinion that the act was invalid, and considering it his duty so to treat it, continued to discharge the duties of president judge of the district; whereupon, the attorney-general, in the name of the commonwealth, sued out a writ of *quo warranto*, to test the right of the respondent to exercise the jurisdiction and perform the duties and functions of judge of the courts of the district; and this brings before us the inquiry, whether the legislature had the power to deprive him of *all* jurisdiction and power under his commission, granted in pursuance of the constitution, and to transfer the exercise of the same to other judges, neither elected nor commissioned for that purpose. The essence of the inquiry under the facts is, whether the legislature, by a mere legislative act, can remove a judge from the exercise of the duties and jurisdictions of his office, and appoint another, or others, to fill his place.

Pursuant to his election, Judge Gamble received a commission from the governor, the tenure of which was, by the constitution, to continue for ten years, on the only condition that he should so long "behave himself well." Having taken the office and entered upon the performance of its duties, its duration was assured to him by the constitution for the full period mentioned, subject to be terminated only by death, resignation or breach of condition, which breach could not be legislatively determined, but only by a trial before the senate on articles of impeachment duly preferred, or, in case the breach amounted to total disqualification, perhaps by address of two-thirds of each branch of the legislature. These are the ordained constitutional remedies in such cases, and there can be no others. *Low v. The Commonwealth*, 4 Met. (Ky.) 237.

These constitutional provisions, and another requiring that adequate compensation shall be provided by law for the judges, which shall not be diminished during the continuance of their offices, not only give precision, but inviolability, to the tenure of the judicial office, by any but the constitutional mode referred to. Their object and effect were, undoubtedly, to establish the complete independence of the judiciary, not only in its operations among the people, but as against possible encroachments by the other co-ordinate branches of the government. Possessing neither the power of the purse nor the sword, as the executive and legislative branches, without using the expression in an entirely figurative sense, may be said to do, the judiciary was by far the weakest branch of the government; and as its operations were necessarily to affect individual interests in the community, it was obviously proper, in order to secure its independence against the action of the other branches more liable to be swayed by impulse, or operated upon by individual, party or sectional influence, to protect it by express constitutional barriers; and it was so done. Nowhere is this, as an essential principle of the constitution, better expressed than by ROGERS, J., in *The Commonwealth v. Mann*, 5 W. & S. 403. Among other remarks of the learned judge are the following: "The independence of the judges is equally requisite to guard the constitution and rights of individuals from the effect of those ill-humors which the acts of designing men, or the influence of particular conjunctures, sometimes create among the people themselves, and which, although they speedily give place to better information and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and severe oppression of the minor party in the community."

An independent judiciary must ever be a cardinal principle of constitutional government. It was adopted in forming the federal constitution, both in regard to the express tenure of the office, and in providing a fixed compensation, undiminishable during the continuance of the office. And so in every state in the union this independence is secured, during the tenure of the office, by constitutional provisions, and judges are made secure from interference from any quarter, with the exercise of their jurisdiction and powers, excepting in the modes prescribed in the several constitutions. These provisions were not the result of a wise philosophy or far-seeing policy, merely. They resulted, rather, from severe trials—experience—in the country from which we have largely derived

our laws and many of our principles of liberty. History has preserved numerous melancholy examples of the want of a judiciary independent by law, before it was accomplished in England. The tyrannical reigns of Charles II and James II are so full of them, that the revolution of 1688 could scarcely have been other than a consequence of them. A short time after the revolution, and by the English acts of settlement, it was declared that the salaries of the judges should be ascertained and established by law; and by statute 1 Geo. III they were secured absolutely during the commissions of the judges, which are for life, on the same condition as ours—of good behavior. We must regard this as a clearly established principle of our constitution. The judicial office is created by the constitution, and so is its tenure, and the compensation is protected by it when once fixed by the legislature. The amenability of the judges is also provided for, and this excludes all other modes. Thus is independence supposed and intended to be secured by the constitution. It must follow, therefore, that any legislation which impinges on this feature of the constitution, is invalid. Not only was the judiciary thus made independent, but, as a co-ordinate branch of the government, its protection and existence were supposed to be completely assured.

Could the principle of the independence of the judiciary, and, at the same time, its integrity as a co-ordinate branch of the government, have been more effectually assailed than by the passage of the act repealing the twenty-ninth judicial district, and its transfer bodily to another district and to other judges? Even if the commission might, for compensation, endure after all power and every duty under it had ceased—a result I do not admit—the act was not less destructive of the principle of independence with which it was the purpose of the framers of the constitution to invest the judges. What could be more destructive to all independence of action of a judge than the momentary liability, during the recurring sessions of the legislature, to be dismissed from the exercise of the functions of his office by the repeal or abolition of his judicial district? If, all the while, he must be conscious that he exercises the powers and authority conferred by his commission only by the forbearance of the legislature, although it might be possible that independence of action might still exist, it would be an exception; as a rule, it would be a myth. Such a state of things as would follow a rule, the result of affirming the constitutionality of the act in question, would be

utterly subversive of the independence of the judiciary, and destructive of it as a co-ordinate branch of government. The case of the twenty-ninth district this year might become that of any, or half, the other twenty-eight districts next year, for reasons quite as legitimate as those operating to procure its repeal. Establish this power in the legislature, and it will be as easy, as it will be common, for powerful corporations and influential citizens to move the legislature to repeal districts, and supersede judges who may not be agreeable to their wishes and interests, and transfer their business to other jurisdictions supposed to be more favorably inclined. This would be destructive of all that is valuable in the judicial office, and preservative alone of those evil qualities which flow from a subverted and subservient judiciary. I think in this state there has never been known a more palpable and direct blow at one co-ordinate branch of the government by the others, or one so destructive of the uses for which it was established, as is contained in this act, though undesigned, we must believe. If there were no special reasons for holding it unconstitutional, these general views would require it so to be held.

But, to be more special in reasons for holding the act of the 16th of March, 1869, invalid, it must be regarded as an attempt substantially to abolish the office of the president judge of that district. The constitution, after providing for the election and commissioning of judges, fixes the tenure of their offices, by providing, that "the president judges of the several courts of common pleas, and of such other courts as are or shall be established by law, and other judges required to be learned in the law, shall hold their offices for the term of ten years, if they shall so long behave themselves well." Judge Gamble's commission had nine and two-thirds years to run, when the act in question was passed. By the express terms of the condition it was inviolable, by any authority for any other cause, during this period, than a breach of the condition, in the commission, for good behavior; and, as already said, that could be redressed only by impeachment, or an address by the legislature. This is the mode fixed and ordained by the constitution, and is utterly incapable of being supplied or supplemented, directly or indirectly, by legislative action.

The commission which was issued to Judge Gamble, by authority of the constitution, if in the usual form, and we may presume it was, granted to him the "right and title to have and to execute all

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and singular the powers, jurisdictions, and authorities, and to receive and enjoy all and singular the emoluments to the office of president judge of the court of common pleas of the said twenty-ninth judicial district, lawfully belonging or in any wise appertaining by virtue of the laws of this commonwealth, if he shall so long behave himself well." The commission, authorized by the constitution to be issued, contains an express grant of authority to exercise the powers and jurisdictions of a judge during the full period of its existence, subject only to the condition of good behavior. These powers, authority and jurisdiction constitute the office, and are of the essence of it, and inseparable from it, and are granted to be exercised for the period of ten years, subject to the condition mentioned. This is a constitutional grant of the right to exercise the powers and authority belonging to the office of president judge, and is incapable of any limitation but that attached to it. If this were not so, and it might be changed by legislative action, then would the authority of the constitution be subject and subordinate to legislative authority—a position not to be entertained for a single moment, especially when it is remembered that what the constitution itself ordains is so much of the sovereign power withheld from the legislative power. I of course do not doubt but that the aggregate amount of the duties of a judge in any given district may be materially diminished by a division of his district, or by the election of an assistant. But that grows out of a power to reorganize or regulate the courts—a power not withheld by the constitution, leaving the authority and jurisdiction pertaining to the office intact; and is quite a different thing from taking them away *in toto*. Their extent may, it is admitted, be changed, increased or diminished by a reorganization of the courts. This is an express provision of the constitution, and a condition to which the office is necessarily subject. With these exceptions, no other legislative interference is legal or constitutional. The grant and tenure of the office of judge are fixed by the constitution, and are necessarily an implied prohibition of all interferences with it, in these particulars, by any other authority. In *McCafferty v. Guyer*, 9 P. F. Smith, 109, this court held, that any right defined by the constitution is "in the nature of a constitutional grant, and cannot be taken away by any authority known to the government. It involves a prohibition of interference with it." If this doctrine be true—and there cannot be a doubt about it—an attempt to take away the authority and jurisdiction of

a lawfully commissioned judge can be nothing short of an effort to change, by act of assembly, that which is ordained by the constitution. But, that the legislature must act in subordination to the constitution, needs no argument to prove; and that it does not do so, if it attempt to circumscribe the powers of a constitutional office during its continuance, or to limit its constitutional tenure.

It seems like a solecism to regard that to be an office, in this country, to which there are no duties assigned. "An office," says Kent (vol. 3, p. 454), "consists in a right and correspondent duty to execute a public or private trust, and to take the emoluments." To the same effect are Cruise's Dig. vol. 3, p. 117, and Bouv. Law Dict. *verbum* "Office."

There is no doubt but the post of a president judge is an office. It is not only within the common-law definition quoted, but is expressly so designated in the constitution. It seems to me that it could not be maintained for a moment, therefore, that a president judgeship, created without any duties to be performed, or authority to be exercised, would not be an office in the sense of the constitution, or at common law, as applicable to this country; if so, by parity of reason, it would cease to be such, if its duties and authorities are all taken away. Now, the constitution ordains that the office of president judge shall continue for ten years, and this fixes inevitably the duration of the authority and powers which constitute it an office. They are inseparable; and it establishes that the legislature, by an ordinary act of legislation, cannot take them away during the life-time of the commission. It is sometimes asserted, but I think without due reflection, that a judge's commission will remain, although all his powers and jurisdictions may be taken away. If this were so, judges without districts, might come in time to be as numerous as barristers without briefs are said to be. The tenure of the office does not rest on contract, but on the constitution (*Commonwealth v. Mann, supra*), and is not protected by the constitution of the United States, which prohibits impairment of contracts. It conserves the constitution to occupy this view of the principle, which we think incontrovertible, that constitutional grants imply a prohibition of any limitation or restriction by legislative authority.

I see not how, for another reason, that the commission of a president judge could exist after the total abolition of his district. Every judge is elected in and for a district defined and fixed by law

Commonwealth v. Gamble.

and then he is commissioned, and is required by the constitution to reside within the district. It seems to me it would be a logical conclusion to hold, that, if no district exists to which the commission could apply, and in which the judge would be bound to reside, that there could not exist a commission for any purpose. This, I think, would be the inevitable deduction from such premises; and it would therefore follow, that if the legislature could blot out a district, it could limit the duration of the commission granted to a less period than ten years, if it might so choose. That, it cannot shorten the tenure of the office of a judge, as fixed by the constitution, is certain, and this ought to establish that it can pass no act to do by indirection that which may not be done directly.

Notwithstanding the constitutional provisions referred to, the legislature has not only attempted, by the act of assembly in question, to expel Judge Gamble from his district, but, in fact, has appointed other judges to hold the courts therein, who were neither elected nor commissioned for that purpose. The legislature has, undeniably, by this act of assembly, assumed both the power of appointment and removal of the judge for this district. The act displaces Judge Gamble as the president judge, and appoints Judge White and his law associate to hold the courts therein. If such a thing can be done in one district, it may be done in all, and thus, not only would the independence of the judiciary be destroyed, but the judiciary, as a co-ordinate branch of the government, be essentially annihilated.

Something of this kind was tried in Illinois, but came to nought when examined in the light of constitutional law by the courts. There, as in the case we have here, a district was by act of the legislature absorbed in a new one, and for it a judge was elected and commissioned. I refer to the *People ex rel. Ballou v. Dubois*, 23 Ill. 547. In that case it was held by the supreme court of Illinois, that, although the erection of new judicial districts was expressly authorized by the constitution, yet no new districts could be created by which the judge in commission could be deprived of a right to exercise the functions of his office during the continuance of his commission. In delivering the opinion of the court, CATON, C. J., said, "The question is, can the legislature expel a circuit judge from his office by creating a new district, taking from him the territory which constituted his district? The bare reading of the constitution must convince every one that it was intended to prohibit such

a proceeding." (The constitutional provision alluded to is, "The state shall be divided into nine judicial districts, in each of which one circuit judge shall be elected by the qualified voters thereof, who shall hold his office for the term of six years, and until his successor shall be commissioned.") "It was," says the learned judge, "the intention of the constitution to place the judges entirely above and beyond the legislative control or interference, except by impeachment or address. * * * It is the constitution which creates the office of circuit judge, and not the legislature. All the latter can do is, to create new judicial districts; the constitution in advance creates the office of circuit judge for such districts." The conclusion of the court was unanimous, that, by the creation of a new judicial district, an existing one could not be absorbed, and the judge in commission superseded in the discharge of his official duties. To the same effect is *The State v. Messmore*, 14 Wis. 163, in which is to be found a most able and exhaustive opinion by DIXON, C. J., upon a state of facts raising mainly the question in this case, and on the effect of the repeal and creation of new judicial districts upon existing commissions. The learned judge makes use of this emphatic language: "And here we may say, what is in fact applicable to another branch of the case, that we wholly reject the other exposition of the defendant's counsel, upon which it was claimed that, by virtue of the power of increase and alteration, jurisdictions and judgeships are made itinerant and wandering in their nature; that a circuit may be entirely shifted from the district or territory for which it was created, and judges assigned to places outside the jurisdictions for which they were chosen, or, as was said, left no jurisdiction, and no mark of office save the name and salary. That this would be contray to the spirit and intention of the framers of the constitution is manifest from every provision on the subject." This is a substantial statement of the question before us, and the conclusion of the court in that case was against the attempt to absorb a judicial district by the erection of another, and fully sustains the conclusion arrived at in this case.

The case principally relied on by the learned counsel for the commonwealth in their argument is, *Respublica v. McLean*, 4 Yeates, 899. That was an early case affecting a justice's commission, and was ruled by a divided court, consisting of three judges; C. J. TILGHMAN and BROKENBRIDGE, J., holding, although for different reasons, that the commission of the justice ceased by reason of that.

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portion of the county in which he resided, and for which he was commissioned, being set off and forming a portion of a new county. YEATES, J., held the contrary. It would have greatly retarded the improvement of the state, if new counties could not have been formed out of the territory of the large counties originally established, some of them extending in length and breadth over more than one hundred and fifty miles, because of the existing commissions of the magistrates in the old counties. On the other hand, it was not easy to hold that the commission continued in force in a county for which it was not issued. On these conflicting positions of the laws and obvious interests of the state that decision was made. We do not think it rules this case by any means, because of the essential differences between it and the present circumstances in fact and law. A similar case cannot arise, I presume, under the constitution of 1838, which provides for the election and commissioning of justices of the peace for townships, wards and boroughs. It is probable that, if a township were set off to a new county, the commission of the justice would legally remain in force. That was the determination of the supreme court of New York, in 1823, in *Ex parte McCollum*, 1 Cowen, 550. We make no decision of this point, however. We only mean that we are not bound to decide for the commonwealth in this case on account of any thing contained in *Respublica v McLean*.

[The remainder of this opinion, not being concurred in by the other judges, is not inserted.]

Judgment sustained.

 PENNSYLVANIA RAILROAD V. KERR.

(22 Pa. 303.)

Negligence — remote cause of injury

A warehouse, situated near the railroad track, was set on fire by sparks from one of plaintiffs' locomotives. The burning warehouse communicated fire to defendant's hotel (situated thirty-nine feet distant), whereby it was consumed. *Held*, that the plaintiffs were not liable for the destruction of the hotel, or property therein, by reason of the injury being too remote.
Ryan v. New York Central Railroad, 85 N. Y. 210, approved.

ERROR to common pleas of Huntington county.

Action for damages from loss of personal property owned by defendant, and contained in a hotel occupied by him.

One of plaintiffs' locomotives, on the 28th of April, 1868, at Mill Creek, set fire to a warehouse situated near the track. The burning warehouse—a brisk wind blowing at the time—communicated its flames to several buildings, among which was the hotel, situate thirty-nine feet distant, occupied by defendant, and which contained personal property belonging to him. The hotel and property were consumed.

In the court below, judgment was given against the railroad company for the value of the property, and an appeal was taken by them.

W. Dorris and J. G. Miles, for plaintiffs.

R. M. Spear and R. B. Petriken, for defendant.

The opinion of the court was delivered July 6, 1870, by

THOMPSON, C. J. It has always been a matter of difficulty to determine judicially the precise point at which pecuniary accountability for the consequences of wrongful or injurious acts is to cease. No rule has been sufficiently defined and general as to control in all cases. Yet there is a principle applicable to most cases of injury, which amounts to a limitation. It is embodied in the common-law maxim, *causa proxima non remota spectatur*—the immediate, and not the remote cause, is to be considered. 3 Pars. on Cont. 198, illustrates the rule aptly by the supposititious case of debtor and creditor, as follows: "A creditor's debtor has failed to meet his engagements to pay him a sum of money, by reason of which the creditor has failed to meet *his* engagement, and the latter is thrown into bankruptcy and ruined. The result is plainly traceable to the failure of the former to pay as he agreed. Yet the law only requires him to pay his debt with interest. He is not held for consequences which he had no direct hand in producing, and no reason to expect. The immediate cause of the creditor's bankruptcy was his failure to pay his own debt. The cause of that cause was the failure of the debtor to pay him, but this was a remote cause, being thrown back

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by the interposition of the proximate cause, the non-payment by the creditor of his own debt." This I regard as a fair illustration of what is meant in the maxim, by the words "*proxima*" and "*remota*." See also notes, same volume, p. 180.

In *Harrison v. Berkley*, 1 Strob. (S. C.) 548, WARDLAW, J., indulges in some reflections on this point worth referring to in this connection. "Every incident," says he, "will, when carefully examined, be found to be the result of combined causes—to be, itself, one of various causes which produce other events. Accident or design may disturb the ordinary action of causes. It is easy to imagine some acts of trivial misconduct or slight negligence, which shall do no direct harm, but sets in motion some second agent that shall move a third, and so on, until the most disastrous consequences shall ensue. The first wrong-doer, unfortunate, rather than seriously blamable, cannot be made answerable for all these consequences."

It is certain, that, in almost every considerable disaster, the result of human agency and dereliction of duty, a train of consequences generally ensue, and so ramify as more or less to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. This is one of the vicissitudes of organized society. Every one in it takes the risk of these vicissitudes. Willfulness itself cannot be reached by the civil arm of the law for all the consequences of consequences, and some sufferers necessarily remain without compensation. The case of *Scott v. Shepherd*, 2 W. Bla. 893, the case of the squib, is sometimes cited as extending the principle of the maxim; but it is not so. The doctrine of proximate and remote causes was really not discussed in that case. One threw a squib in a market-place among the crowd. It fell on the stall of one, who immediately cast it off to prevent its exploding there, and it struck a third person and exploded, putting out his eye. The question was, whether the defendant could be made answerable in the form of action adopted, which was trespass. DE GREY, C. J., held, that the first thrower, the defendant, was answerable, for that, in fact, the squib did the injury by the first impulse. In this way the action of trespass was sustained. It is no authority against the principle suggested. There must be a limit somewhere. Greenleaf, in vol. 2, § 256, touches the question thus: "The damages to be recovered must be the natural and proximate consequence of the act complained of." This is undoubtedly the rule. The difficulty is in distinguishing what is proximate and what

remote. I regard the illustration from Parsons, already given, although the wrong supposed arises *ex contractu*, as clear as any that can be suggested.

It is an occurrence undoubtedly frequent, that, by the careless use of matches, houses are set on fire. One adjoining is fired by the first, a third is by the second, and so on, it might be, for the length of a square or more. It is not in our experience that the first owner is liable to answer for all these consequences; and there is a good reason for it. The second and third houses, in the case supposed, were not burned by the direct action of the match; and who knows how many agencies might have contributed to produce the result? Therefore, it would be illogical to hold the match chargeable as the cause of what it did not do, and might not have done. The text books, and, I think, the authorities, agree, that such circumstances define the word "*remota*," removed, and not the immediate cause. This is also Webster's third definition of the word "*remota*." The question, which gives force to the objection that the second or third result of the first cause is remote, is put by Parsons, vol. ii, 180: "Did the cause alleged produce its effects without another cause intervening, or was it made to operate only through, or by means of, this intervening cause?" There might possibly be cases in which the causes of disaster, although seemingly removed from the original cause, are still incapable of distinct separation from it, and the rule suggested might be inapplicable; but of these when they occur. The maxim, however, is not to be controlled by time or distance, but by the succession of events.

The case in hand is a claim against the defendant under these circumstances, briefly: A warehouse of one Simpson, situate very near the track of the company's road, was set on fire by sparks emitted from a locomotive engine of the defendants, so negligently placed as to set it on fire. The burning of the warehouse communicated fire to a hotel building situated some thirty-nine feet from the warehouse, which, at the time, was occupied by the plaintiff as tenant, and it was consumed, with its furniture, stock of liquors and provisions, and for this the plaintiff sued and recovered below. Several other disconnected buildings were burned at the same time, but this is in no way involved in this case. No doubt the company was answerable for the destruction of the warehouse, resulting from the negligence of the company's servants in the use of the engine. The authority to the company to use steam on their road does not

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exempt it from liability for injury resulting from the negligent use of it. *Lackawanna & Bloomsburg R. R. Co. v. Doak*, 2 P. F. Smith, 379. The learned judge charged that the defendants were liable to the plaintiff to the extent of his loss, by reason of the burning of the hotel, although by fire communicated from the warehouse, if the latter was set on fire by the negligence of the defendants' servants, in the manner mentioned. To this charge the defendants excepted, and assign it for error, and this presents the question of this case.

This charge was, of course, the equivalent of holding, that a recovery for all the consequences of the first act of negligence of the defendants was in law allowable. We are inclined to think in this there was error, for the reasons already given, and others that will be given. It cannot be denied but that the plaintiff's property was destroyed, but by a secondary cause, namely, the burning of the warehouse. The sparks from the locomotive did not ignite the hotel. They fired the warehouse, and the warehouse fired the hotel. They were the remote cause—the cause of the cause of the hotel being burned. As there was an intermediate agent or cause of destruction, between the sparks and the destruction of the hotel, it is obvious that that was the proximate cause of its destruction, and the negligent emission of sparks the remote cause. To hold that the act of negligence, which destroyed the warehouse, destroyed the hotel, is to disregard the order of sequences entirely, and would hold good if a row of buildings a mile long had been destroyed. The cause of destruction of the last, in that case, would be no more remote, within the meaning of the maxim, than that of the first; and, yet, how many concurring elements of destruction there might be in all of these houses, and no doubt would be, no one can tell. So to hold would confound all legitimate ideas of cause and effect, and really expunge from the law the maxim quoted, that teaches accountability for the natural and necessary consequences of a wrongful act, and which should, in reason, be only such that the wrong-doer may be presumed to have known would flow from his act.

According to the principle asserted, a spark from a steamboat on the Delaware might occasion the destruction of a whole square, although it touched but a single separate structure. No one would be likely to have the least idea of such accountability, so as to govern and control his acts accordingly. A railroad terminating in a city might, by the slightest omission on the part of one of its numerous servants, be made to account for squares burned, the con-

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sequence of a spark communicating to a single building. Were this the understanding of the extent of liability under such circumstances, it seems to me that there might be more desirable objects to invest capital in than in the stock of such a railroad. But it has never been so understood or adjudged. LOWRIE, J., in *Morrison v. Davis & Co.*, 8 Harris, 171, illustrates the argument against such liability most strikingly, by reference to a well-known fact. In the case he was treating, a horse in a canal boat team was lame, in consequence of which the boat was behind time in reaching the Juniata river, and in consequence of that was overtaken by a flood in the river, which destroyed the boat with its freight. The carrier, the owner of the boat, was charged with being negligent in using a lame horse, the occasion of the delay. In treating this as only the remote cause of the disaster, the learned judge said: "There are often very small faults which are the occasion of the most serious and distressing consequences. Thus, a momentary act of carelessness set fire to a little straw, and that set fire to a house, and, by an extraordinary concurrence of very dry weather and high winds, with this little fault one-third of a city (Pittsburg) was destroyed; would it be right that this small act of carelessness should be charged with the whole value of the property consumed?" The answer would and ought to be, no; it was but the remote cause of it. Innumerable occasions must have occurred in this commonwealth for asserting liability to the extent and upon the principle claimed here, yet we have not a solitary precedent of the kind in our books. This is worth something as proof against the alleged principle. It was Littleton's maxim, "that what never was, never ought to be." 1 Vern. 385.

The question in hand has not been adjudicated in this state, and but seldom discussed in any of the other states; yet we have a case decided in the court of appeals of the state of New York, in 1866, which is directly in point in support of the doctrine we have been endeavoring to advance above. It is the case of *Ryan v. New York Central Railroad Co.*, 35 N. Y. (8 Tiff.) 210. The facts in that case briefly were, that the defendant, by the carelessness of its servants, or through the insufficient condition of one of its locomotive engines, set fire to its own wood-shed with a large quantity of wood therein. The plaintiff's house, situated some 130 feet from the shed, took fire from the heat and sparks of the burning shed and wood, and was entirely consumed. A number of other houses

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and buildings were destroyed by the spreading of the fire. The plaintiff brought suit against the company for his loss. On the presentation of these facts at the trial, the circuit judge nonsuited the plaintiff, and at the general term of the supreme court of the fifth district the judgment was affirmed. The case was then removed to the court of appeals, where the judgment was unanimously affirmed, in an elaborate and exhaustive opinion by HUNT, J. Every position taken by the counsel for the defendant in error here was taken there, and examined and answered fully in the opinion. All the English and American cases supposed to have any bearing on the point in dispute there, on the same question we have here, are noticed by him, and the doctrine clearly deduced that the railroad company was not answerable to the plaintiff for the loss of his house being burned by fire communicated by the burning shed. That case is not distinguishable in principle, or in the manner of destruction, from this. It is on all fours with this case.

But it seems to have been thought that *The Insurance Co. v. Tweed*, 7 Wal. (U. S.) 45, conflicts with the above case. I do not think it does, when understood. It was an action on a policy of insurance against fire, in which there was an exception of several matters, viz.: invasion, insurrection, military and usurped power, *explosion*, earthquakes, etc. An explosion took place in a warehouse on the opposite side of the street from the insured property, and scattered fire and burning fragments upon the insured property and destroyed it. The decision of the supreme court was, that the loss was within the exception of loss by fire occasioned by explosion. To me it seems that it would have been rather more rational to have held that the destruction was by fire, *per se*. But the court interpreted the terms of the contract of the parties in this way. We must remember that there may be a difference between interpreting the obligation of a contract, and defining liability under the law of social duty. Certain it is, the laws are not the same. One does not necessarily rule the other. I may say further, that there is no evidence, in the opinion of Mr. Justice MILLER, that he had specially in view the same question so ably discussed by Mr. Justice HUNT, or, if he had, that his investigations extended so far as did those of the last named judge. He does not even refer to the New York case at all.

The question here involved does not seem to have been definitely determined in England; why, I am at a loss to know. There have

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been decisions, it is true, imposing liability against the reasons we have expressed above, but in none of them is the question of proximate and remote cause of the injury discussed at all. Such is the case in *Piggot v. The Eastern Counties Railroad Co.*, 54 E. C. L. R. 229, cited by the counsel for the defendant in error; and such is the recent case of *Smith v. The London and Southwestern Railway Co.*, Law Rep., March, 1870, p. 98. In this case, BOVILL, C. J., and KEATING, J., affirmed the recovery. BRETT, J., dissented. Both these cases were in the court of common pleas. I find no review of the question in the exchequer chamber. I regard these cases as passing over the question that was decided in the court of appeals in New York, and which is before us now, *sub silentio*. HUNT, J., expresses, to some extent, my experience, when he says: "I have examined the authorities cited from the Year Books, and have not overlooked the English statutes on the subject, or the English decisions, extending back for many years. It will not be useful further to refer to the authorities, for it will be impossible to reconcile some of them with the views I have taken." I entirely agree, that if they shed any light, it is too uncertain and dim to be followed with safety; while, on the other hand, the concurrence of principle, with a just measure of responsibility, we think, is best subserved by the rule we suggest. With every desire to compensate for loss when the loser is not to blame, we know it cannot always be, without transcending the boundaries of reason, and, of course, of law. This we cannot do, and we fear we would be doing it, if we affirmed the judgment in this case. The limit of responsibility must lie somewhere, and we think we find it in the principle stated. If not found there, it exists nowhere. We have not been referred to any case, in any of the state courts, excepting those noticed; and I have not myself discovered any which, in the least, militates against the foregoing views. We are, therefore, constrained to follow the result of our conclusions, and reverse the judgment in this case. At present we will not order a *venire de novo*, but if the plaintiff below and defendant in error desire, we will order it on grounds shown for it, if made in a reasonable time.

Judgment reversed.

Schmertz v. Shreeve.

SCHMERTZ *et al.* v. SHREEVE *et al.*

(22 Pa. 457.)

Partnership — contracts under seal of partner.

A partner has no authority to bind his firm by an instrument under seal, even where the seal is not essential to the validity of the instrument.

But where the contract is independent of the instrument, and has been executed on behalf of the firm, the making for the purposes of evidence of an instrument, under seal, by a partner, will not vitiate such contract.

ERROR to court of common pleas, Venango county.

Action on an agreement for the sale of petroleum by defendants to plaintiffs, which agreement was in writing signed by the plaintiffs' firm name, and also by defendants' firm name of Shreeve & Say. The instrument was also under seal. The defendant Say signed the name of his firm and affixed the seal, for which acts he had no authority from his partner, who never recognized the agreement.

The jury found for the plaintiffs, but in no specific sum. The plaintiffs appealed. The specifications of error assigned appear sufficiently in the opinion.

S. O. T. Dodd and Myers & Kinnear for plaintiffs, cited *Fichthorn v. Boyer*, 5 Watts, 159; *Bond v. Atkin*, 6 W. & S. 165; *Johns v. Battin*, 6 Casey, 84; *Deckard v. Case*, 5 Watts, 22; *Hennessey v. Western Bank*, 6 W. & S. 300; *Dubois' Appeal*, 2 Wright, 231; *Story on Partn.* 122; *Tapley v. Butterfield*, 1 Met. 515; *Milton v. Mosher*, 7 id. 244; *Baum v. Dubois*, 7 Wright, 260; *Jones v. Horner*, 10 P. F. Smith, 214.

Taylor & Mackey and McCalmont & Osborn, for defendants.

SHARSWOOD, J. It is admitted, in the printed argument of the plaintiffs in error, that the first four assignments of error raise but a single question for decision, and this dispenses with the necessity of considering them separately. That question, as stated in the plaintiffs' first point, which the learned judge below answered in the negative, is, whether, when a partner signs with a seal the firm came to a contract, to the validity of which a seal is not essential. it

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binds the firm. This question, of course, has reference to the particular instrument which formed the groundwork of the action. It was a contract to deliver merchandise at a future time, for a certain price, to be paid by the plaintiffs; and the suit was to recover damages for the failure of the defendants to fulfill that engagement. It was, therefore, an executory contract, imposing a new and original liability on the firm. It is certainly true, that a seal was not essential to its validity. But that is not the test. It rather is, did it change its nature? This is unquestionable. A seal imports consideration; and a contract under seal requires no consideration to support it. Moreover, there is no limitation prescribed by law to an action on a specialty or a covenant under seal. The law is too well settled to be now disturbed, that the general implied power of a partner does not extend to binding the firm by instruments under seal. There are some exceptions to this rule, none of which, however, impair the rule itself; for it is true in this instance as in all others, that *exceptio probat regulum*. The terms, indeed, in which the rule is stated exclude all cases of express authority to make the contract, and of subsequent ratification. Still, the authorities, in thus holding, confirm the general doctrine; for, where is the necessity of proving either prior assent or subsequent ratification, if the power is implied? *Fichthorn v. Boyer*, 5 Watts, 159; *Bond v. Aitkin*, 6 W. & S. 165; and *Johns v. Battin*, 6 Casey, 84, are, therefore, determinations in point. These were all cases of contracts, to the validity of which a seal was not essential. *Bond v. Aitken*, indeed, was a simple promissory note. But they were executory contracts. Executed contracts, such as assignments, stand on another ground. They form but the evidence of the act. The sale and delivery of merchandise, for example, is within the implied power of a partner. That he superadds a transfer, or bill of sale under seal, is but evidence of the act of disposition, and does not change its nature. When the property has been delivered, it matters not whether the instrument of transfer be under seal or not. *Deckard v. Case*, 5 Watts, 22. By the execution of the contract, consummated by delivery, the property is transferred to the assignees, which cannot be avoided by the fact that the instrument, which is the evidence of the agreement, is under the seal of one of the partners only. *Hennessy v. The Western Bank*, 6 W. & S. 300. In *Dubois' Appeal*, 2 Wright, 236, STRONG, J., takes the distinction between an executed and an executory contract. "The partnership relation," said he,

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"will not authorize one partner to execute an instrument, under seal, whereby a new and original obligation is imposed on the firm." See, also, *Bewley v. Tams*, 5 Harris, 485, and *Snyder v. May*, 7 id. 235. The cases of *Baum v. Dubois*, 7 Wright, 260, and *Jones v. Horner*, 10 P. F. Smith, 214, do not, as supposed, conflict with this doctrine. All that they determine is, that a parol authority to an agent to make a contract may be executed by him under seal; the seal, being beyond his authority, may be rejected as surplusage. It never has been decided, and probably never will be, that, where one partner expressly authorizes his co-partner to make a certain contract, his affixing a seal would vitiate it. The rule in question, accurately stated, extends only to the implied, not to the express, power of one partner to bind the firm. There was no error, therefore, in the answers and charge of the learned judge below, which form the subjects of complaint in the first four assignments of error.

But the judgment must be reversed, for the verdict is bad. This was expressly decided by this court in *Miller v. Hower*, 2 Rawle, 53, that a verdict, in an action of debt, finding no specific sum, is void, and the judgment was reversed on that ground alone; and this is again recognized and approved in *Whitesides v. Russell*, 8 W. & S. 47.

Judgment reversed, and venire facias de novo awarded.

BURRELL TOWNSHIP V. PITTSBURG GUARDIANS OF THE POOR.

(62 Pa. 472.)

Settlement—child's settlement follows that of parent.

The settlement of the parents determines the settlement of an unemancipated child, and, where the head of the family changes his settlement, that of his children changes with him. This is the case when, upon death of the father, the mother becomes head of the family.

N. W., the widowed mother of A. K. W., removed from the township of Burrell where she had a settlement, to Pittsburg. She there leased a house, and resided in it until her death. In the meantime A. K. W. became deranged, and after the death of his mother became a pauper. *Held*, that by the act of the mother changing her settlement, that of A. K. W. was also changed, and that Burrell township was not liable for the support of the pauper.

Although the father and mother stand upon a different footing as to their children, in relation to private parties, in regard to the public their standing is the same.

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ERROR to court of quarter sessions of Indiana county.

Nancy Weir, the widow of McKee Weir, at the time of the death of her husband, resided in Burrell township, Indiana county. After her husband's death she removed to Cambria, and then to Pittsburg, her two sons accompanying her. In the spring of 1860 she leased a house in the ninth ward of that city, and was, at the time of her death, which took place about two years afterward, a resident of said ward.

Her son, Aaron F., aged about twenty, a year or so after coming with her to Pittsburg became deranged, and, subsequent to her death, up to which time he resided at home, was placed in a hospital, as a pauper.

An order having been made by two justices of the peace of Indiana county, adjudging the ninth ward of Pittsburg to be the pauper's legal settlement, which order was vacated by the court of quarter sessions, the township took a writ of error to this court.

Stewart & Clark, for plaintiffs, cited *Mifflin v. Elizabeth*, 6 Harris, 17; Act of June 13th, 1836, § 9, Pamph. L. 542; Purd. 797, pl. 16; 3 Burn's Just. 373; *St. George v. St. Catharine's*, 1 Settlement Cases, 69; *Woodend v. Paulspury*, 2 Ld. Raym. 1473; *Barton Turfe v. Happisburg*, Burrows Sett. Ca. 49; *Oulton v. Wells*, id. 64; *St. Mithew v. St. Catharine*, id. 482; *Dedham v. Natick*, 16 Mass. 135; *Bradford v. Lunenburg*, 6 Verm. 481; *Norwich v. Saybrook*, 7 Conn. 384; *Great Barrington v. Tyringham*, 18 Pick. 264; *Freetown v. Taunton*, 16 Mass. 52; *Hebron v. Colchester*, 5 Day, 169; *Lebanon v. Hebron*, 6 Conn. 45; *Nippenose v. Jersey Shore*, 12 Wright, 402; *Toby v. Madison*, 8 id. 60; *Marion v. Spring*, 14 id. 308; *Oxford v. Ramsey*, 3 N. H. 331; *Washington v. Bear*, 3 W. & S. 548.

J. M. Thompson, for defendants, cited Act of 1836, § 10, Pamph. L. 543; Purd. 797, pl. 18; *Washington v. Bear*, *supra*; *Lewis v. Turbut*, 3 Harris, 147; *Leech v. Agnew*, 7 Barr, 21; *Fairmount Pass. Railway v. Stutler*, 4 P. F. Smith, 378.

THOMPSON, C. J. There was no dispute below about the fact that the father of the pauper Weir, had, at the time of his death, which occurred in the minority of the latter, a legal settlement in Burrell township. The dispute was, whether the mother had gained

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such a settlement, in the ninth ward of the city of Pittsburg, as fixed it as the settlement of her son. The learned judge ruled this in the negative, and hence this writ of error.

The undisputed facts seem to be, that Mrs. Weir, the mother of the pauper, removed to the city of Pittsburg in 1869, from Johnstown, Cambria county, where she had resided, her sons living with her, some six months or more, and took a house in the ninth ward of the city of Pittsburg, at the rental of \$3.25 per month, and lived there, keeping house, her sons with her as her family, for thirteen months consecutively, during all of which time she paid the rent as agreed until she died; and from that time her son, the pauper, became utterly imbecile, wandering about without capacity to take care of himself, until the order of removal was issued which gives rise to this controversy.

It has been repeatedly decided (3 Harris, 145, 2 Jones, 92, and 3 S. & R. 117), and cannot now be a question, that children, until they have acquired legal settlements by their own acts, remain settled where born; the settlement of their parents being their settlement. This is a deduction from the statute, for it is not so expressly provided by the act of 13th June, 1836. But the act expressly provides, that, after the death of the husband, the wife's legal settlement shall be *deemed* to be the place where he was last legally settled. This is equivalent to the expression, "*shall be taken to be*," and admits of the existence of a different state of facts, namely, a settlement acquired by the widow herself; and so it has been decided in *Mifflin Township v. Elizabeth Township*, 6 Harris, 17. That a widow may acquire a legal settlement thus, admits of no doubt. She may undoubtedly lease or buy real property and occupy it, being *sui juris*, as well as another. Still we have no reported decisions which carry a derivative settlement to her children, as a consequence of her settlement. Nor is there any statutory provision or decided case against it, in this commonwealth. Why, therefore, shall it not be so on principle?

It is the headship of the family which gives to the settlement acquired by the father the same right to his unemancipated children. Why, therefore, should not this be so of the last legal settlement of the mother, when she, by death of her husband, becomes the head of the family? I see not wherein charges upon the public would be increased by the application of the rule to an acquired settlement of the mother. She, if of sufficient ability

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like her husband if living, is liable by the statute to maintain her children, and keep them from becoming a public charge. There is no distinction in this respect. Nor is there any difference, in the process and mode by which she acquires a settlement, from that of any other person. She becomes entitled to it by a compliance with the terms of the acts of assembly, by leasing property of a certain yearly value, residing therein and paying the rent for one whole year, or by purchasing real property, occupying it and paying taxes thereon for the same length of time. In the same way, the husband, if living, would acquire a settlement for himself, and which would be communicable to his children. It is neither according to the natural nor statutory law, that a woman is to separate from her children, or they from her, on the death of her husband; nay, more, they cannot be taken from her. What good reason can there be alleged, why, when necessity, it may be, induces the widow with her family to leave the place of her husband's last settlement with a view to better her on their condition, that she shall not, on complying with the terms of the law, acquire a settlement communicable to her children? I see none, and I think there is none.

In England there is none, as has been decided in many cases. *St. George's Parish v. St. Catharine's*, 1 Sessions Cases, 73; 2 *Ld. Raym.* 1474; Fortescue, 218. So in *Rez v. Barton, Turfe and Hap-pesburg*, 2 *Ld. Raym.* 1734, *coram* Lord HARDWICKE, C. J., and associates. It was thus held that a child may gain a settlement under its mother's settlement, after the father's death, equally as under its father while living. The mother's settlement has the same effect upon the child as the father's had. This case is to be found in *Burr. Settlement Cases*, 72, and in 3 *Burn's Just.* (374) 442. See also *Rez. v. St. George's, in Hanover Square, Set. Cas.* 273. There is no difference between an acquired and derivative settlement. *Id.* 482.

In Massachusetts the same thing has been held in several cases. *Dedham v. Natick*, 16 *Mass.* 135, is a decision in point, and contains a reference to others. WILDE, J., in rendering the decision of the court in that case, says: "The mother, after the death of the father, remains the head of the family. She is bound to support them if of sufficient ability; and they cannot by law be separated from her." And in concluding in favor of the derivative settlement from the mother, he remarks, that this accords with the English decisions on the subject. The same doctrine is announced

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in *Great Barrington v. Tyrringham*, 18 Pick. 264, in *Bradford v. Lunenburg*, 5 Vt. 481; *Hebron v. Colchester*, 5 Day, 169; *Norwich v. Saybrook*, 5 Conn. 384; and in *Lebanon v. Belure*, 6 id. 45.

More cases to the same effect might be cited, but we think it unnecessary. It is not an answer to this view of the case, that the common law distinguishes between the rights of father and mother, in relation to the right of suit on account of services, or for injuries to children, growing purely out of the relation of parent and child. The cases cited by the learned counsel for the defendant in error, of *Leech v. Agnew*, 7 Barr, 21, and *Fairmount Pass. Ry. Co. v. Stutler*, 4 P. F. Smith, 375, mark this. The distinction seems to be, that as the mother is not by implication of law bound for maintenance and education of her children, while the father is, therefore she is not entitled to claim for services or injury as parent merely. But this is the difference between their parents, in relation to private parties; as to the public, in regard to their children, they are on precisely the same footing; each is bound to maintain them against becoming a public charge. As to the public, therefore, each should derive the same results from settlement, and communicate similar consequences to their children, where no statute or policy forbids it.

Entertaining these views, we think the learned president of the quarter sessions committed an error in reversing the order of the justices in the case, and that his order must be

Reversed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

LEONARD and another v. THE NEW YORK, ALBANY, AND BUFFALO ELECTRO-MAGNETIC TELEGRAPH COMPANY.

(41 N. Y. 544.)

Telegraph company — mistake in transmitting message — measure of damages — negligence.

Plaintiffs' agent in Chicago telegraphed to his agent in Oswego for 5,000 sacks of salt. By the carelessness of the operator, the telegram was made to read "casks;" and 5,000 casks were sent, for which there was no market in C., and which were sold at a loss. In an action against the telegraph company for damages arising from the mistake, — *Held*, that the measure of damage was the difference between the market value at O. and at C., together with the cost of transportation from O. to C. GROVER, J., *dissentiente*.

Held, also, that the failure of the plaintiffs' agent at Oswego to attempt to withdraw the shipment, on learning the mistake, after the goods had been shipped, and, as he supposed, had actually gone, but, in fact, as afterward appeared, before they had gone, was not such legal negligence as would prevent the plaintiff's recovering.

Per HUNT, J. Where a telegraph company receives a message to be transmitted to a point beyond its own line and on a connecting line, it undertakes for care and attention in transmitting it over its own line, and for its prompt delivery to a competent and responsible company for further transmission. When so delivered, its liability terminates, and that of the receiving company begins. A telegraph company is not liable, as a common carrier, but only for want of proper care and attention.

NOTE. — For the purpose of giving the March term complete, we have included this and the following case, reported in 41 New York. — *RR.*

Leonard v. The New York, Albany and Buffalo Electro-Magnetic Telegraph Co.

APPEAL from the judgment of the supreme court, at general term, affirming a judgment for the plaintiffs.

The plaintiffs, at the time of the transaction, were manufacturers of and dealers in salt, at Syracuse, New York. Magill & Pickering were their agents for the sale of salt in Chicago, and D. B. Staats was their agent for shipping and disposing of salt at Oswego.

The defendants were the owners of a line of telegraph between New York and Buffalo, connecting at Syracuse with a line to Oswego, and at Buffalo with the line of the Western Union Telegraph Company, extending to Chicago.

On the 24th of September, 1856, the plaintiffs' agents in Chicago delivered to the Western Union Telegraph Company, at Chicago, to be sent to the plaintiffs' agent at Oswego, the following dispatch, and paid the usual charge for transmitting the same:

"D. B. STAATS, Oswego:

"Send 5,000 sacks of salt immediately.

"MAGILL & PICKERING."

The dispatch was sent by the Western Union Telegraph Company to Buffalo, and there delivered to the agent of the defendants. It was thence transmitted over defendants' line to Syracuse, and there delivered by defendants' agent to the Oswego line, and transmitted to Oswego. But the defendants' agent in Syracuse, in transcribing the dispatch for delivery to the Oswego line, by mistake wrote the word *casks*, instead of "sacks," so that it read, when delivered to the Oswego line, and by that line to Staats, as follows:

"D. B. STAATS, Oswego:

"Send 5,000 casks of salt immediately.

"MAGILL & PICKERING."

In the salt trade, at the time, the term "sack" was known and used to designate a package of fine salt, of about fourteen pounds, and the term "cask" to designate a package of coarse salt, of about three hundred and twenty pounds.

Staats received the telegram on the afternoon of September 24, and immediately telegraphed to plaintiffs at Salina as follows:

"Shall I ship Magill & Pickering 5,000 casks? Just received order."

On the 25th of September, plaintiffs answered by telegraph, as follows:

"You may ship Magill & Pickering the 5,000."

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This dispatch was received by Staats on the same day, and he chartered the schooner Lathrop, and shipped by it to Magill & Pickering, at Chicago, 2,733 20.28 barrels of coarse salt, equal to 2,392 casks.

The same day (25th), Staats telegraphed plaintiffs:

"Ship along immediately; fleet in; Magill & Pickering telegraphed, 'Send us 5,000 casks salt immediately;' I suppose coarse."

On the 26th September, the plaintiffs, by telegraph, inquired of Magill & Pickering what kind of salt they wanted, coarse or fine, and received a reply, stating three-quarters fine, balance coarse; and on the same day they informed their agent Staats, at Oswego, by telegraph, of the exact nature of the reply. He received this dispatch after the lading of the vessel was completed, the bill of lading signed, and the vessel had received her clearance, and supposed, at the time, that she had actually left the Oswego harbor; but he made no effort to ascertain whether she had or not. The vessel, however, did not leave the harbor until some time on the day following, which was the 27th of September.

At the time the salt was shipped, the plaintiffs had no knowledge of the condition of the Chicago market as to coarse salt.

When the cargo of salt arrived in Chicago, which was on the 15th of October, its value in that market was not to exceed \$1.25 per barrel. At the time of its shipment, it was worth in Oswego \$1.60 per barrel; and the cost of transporting it to Chicago, with the insurance, was about 27½ cents per barrel.

Magill & Pickering, therefore, stored the whole cargo at the expense of the plaintiff until 1857, when it was sold for less than one dollar per barrel.

This action was brought to recover the damages which the plaintiffs had sustained by reason of the defendants' mistake in transmitting the message, and was tried before a referee, who found substantially the foregoing facts. He also found that there was no negligence on the part of the plaintiffs or of Staats in shipping the salt, and decided as questions of law: "That the failure of Staats to inquire or ascertain whether the vessel containing the salt in question had actually left the Oswego harbor at the time he received plaintiffs' dispatch of the 26th of September, or to make any effort to stay the shipment of said salt, does not constitute such negligence on the part of the plaintiffs, or their agent Staats, as will relieve

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defendants from liability in the premises." Also, "that the measure of damages to which the said plaintiffs are entitled is the difference in the value of the salt at Oswego and Chicago, with the cost of transportation added thereto, with interest from the time of the arrival of said salt at Chicago."

On appeal to the general term the judgment entered on the referees' report was affirmed, and from that judgment of affirmance this appeal is taken.

The cause was submitted in June, 1868; a re-argument was ordered in September of the same year, and it was re-argued in March, 1869; and the court, being again divided, another re-argument was ordered, which took place at the January term, 1870. And the following decision was rendered at the March term of that year.

Grosvenor P. Lowrey, for appellants:

I. The rule of damages adopted by the referee, is erroneous, so far as it includes any loss by change in market price, or interest, or loss by sale, or any other loss than the expense of sending the salt to Chicago. Domat's Civil Law by Strahan, §§ 1972, 1977; Sedg. on Dam. 37; *Hadley v. Bazendale*, 9 Exch. 341; *Griffin v. Colver*, 16 N. Y. 489; *British Columbia, etc., Co. v. Nettleton*, Law Rep. 3 Com. Pleas, 399, 408. The damages allowed by the referee, at least so far as they include interest, loss of profits, or change in market prices, cannot "be fairly supposed to have entered into the contemplation of the parties at the time when they made the contract. *Hamlin v. G. A. R. Co.*, 1 H. & N. 408; *Lane v. Montreal Telegraph Co.*, 7 U. Canada R. C. P. 23; *Stevens v. Same*, 16 U. C. 530; *Kingborne v. Same*, 18 id. 60; *Lansberger v. Mag. Telegraph Co.*, 32 Barb. 530; *U. S. Telegraph Co. v. Gildersleeve*, 29 Maryland, 233. The proximate cause of the loss was the sale at low prices. The defendants neither caused the depreciated prices nor enforced the sale. The case is not so strong as the ordinary cases of failure by a common carrier to deliver goods in time for sale in a high market, in which latter case the carrier has been held not to be liable. *Weibert v. N. Y. and Erie R. R. Co.*, 19 Barb. 36; *Jones v. Same*, 29 id. 633; 3 Parsons on Con. (5th ed.) 180.

II. The plaintiffs' agent Staats was guilty of negligence in not stopping and unloading the vessel after he received notice of the mistake, and thus avoiding most of the damage which plaintiff-

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iffs sustained. *Hamilton v. McPherson*, 28 N. Y. 76; *Milton v. The Hudson River Steamboat Co.*, 37 id. 210, 214; *Rood v. The N. Y. and Erie R. R. Co.*, 18 Barb. 80; *Loker v. Damond*, 17 Pick. 284. The question of negligence, on the finding of the referee, is presented as a pure question of law to this court. *Gonzales v. N. Y. & Harlem R. R. Co.*, 38 N. Y. 442.

Charles Andrews, for respondents:

I. The rule of damages adopted by the referee was favorable to the defendants, and was justified by the principles of law applicable to the subject.

The rule of damage, as laid down in *Hadley v. Baxendale*, 9 Exch. 340, and followed in *Griffin v. Colver*, 16 N. Y. 439, is consistent with the allowance in this case. In the case of a carrier, who has unreasonably delayed in transporting and delivering goods, the rule is settled, that the measure of damage is the difference in the market value when they are delivered and when they should have been. *Kent v. Hudson R. R. Co.*, 22 Barb. 278; *Medbury v. N. Y. & Erie R. R. Co.*, 26 id. 564; *Scoville v. Griffith*, 2 Kern. 509; *Scollard v. The Southeastern Railway Co.*, 7 H. & N. 79; *Wilson v. The Lancashire & Yorkshire Railway Co.*, 30 L. J. C. P. (N. S.) 232; *Inglodow v. Northern R. R. Co.*, 7 Gray, 86; *Sisson v. Cleveland & Toledo R. R. Co.*, 14 Mich. 489. And this, although the goods were not intended to be used for any special purpose, or to be sold at any particular market. *Cutting v. Grand Trunk Railway Co.*, 13 Allen, 381. This analogy has been followed in actions against telegraphic companies. *Squires v. Western Union Telegraph Co.*, 98 Mass. 382; *Wenger v. United States Telegraph Co.*, 55 Penn. 262. These cases are illustrations of the proper application of the rule in *Hadley v. Baxendale*, and in *Griffin v. Colver*.

The damages allowed are the natural result of the breach of the contract, and, because they are so, the law adjudges that they were within the contemplation of the parties when it was made. *Wilson v. The Newport Dock Co.*, 1 Law Rep., Exch. 177, per MARTIN, B.; *Gee v. The Lancashire, etc., Railway*, 6 H. & N. 211, per WILDE, B. These damages were the proximate consequence of the injury. *McDonald v. Snelling*, 14 Allen, 290; *Wilson v. The Newport Dock Co.*, *supra*. Damages, though not contemplated, if the natural result of a breach of contract, may be recovered. *Cory v. Thames Iron Works Co.*, 3 Law R. Q. B. 181.

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The adjudications in cases similar to this establish a rule of damages quite as favorable to the plaintiffs as that adopted by the referee. *Rittenhouse v. The Independent Tel. Co.*, 1 Daly, 475; *Bryant v. The American Tel. Co.*, id. 576; *Parks v. Atl. Cat. Tel. Co.*, 13 Cal. 422; *De Rutte v. N. Y., Alb. & Buff. Tel. Co.*, 1 Daly, 574, *N. Y. & Wash. Print. Tel. Co. v. Dryburgh*, 35 Penn. 298; *Wenger v. U. S. Tel. Co.*, 55 id. 262.

II. There was no negligence on the part of the plaintiffs in acting upon the order delivered to Staats, or in his shipping the salt, or in the fact that, after the plaintiffs' telegram of the 26th of September was received by him, he did not seek and detain the "Lathrop" and her cargo, before she left the Oswego harbor. The finding of the referee upon the question of negligence is conclusive. *Ireland v. Oswego R. R.*, 3 Kern. 533; *Ernst v. Hudson River R. R.*, 36 N. Y. 533; *Keller v. N. Y. Central R. R.*, 26 How. 117; *Bernhard v. Rens. and Sar. R. R.*, 23 How. 169.

Nor should the defendants, whose negligence is conceded, be discharged from liability for the damages sustained by the plaintiffs, unless upon clear and satisfactory evidence of negligence on the part of the plaintiffs, which contributed to produce the injury. *Clark v. Kervin*, 4 E. D. Smith, 21; *Martin v. G. N. R. R. Co.*, 30 Eng. L. & Eq. 477.

EARL, C. J. The appellant seeks a reversal of this judgment upon two grounds, and, unless we find its position right in reference to one or both of them, it is conceded that the judgment must be affirmed.

1st. It claims that the plaintiffs' agent, Staats, was guilty of negligence in not stopping and unloading the vessel, after he received plaintiffs' dispatch of the 26th of September, and thus avoiding most of the damage which plaintiffs sustained. Before this dispatch was received the loading of the vessel was completed, the bill of lading was signed and delivered to the master, and he had procured his clearance from the port of Oswego. Staats knew these facts, and knew, also, that it was usual for vessels, at that season of the year, to hurry their departure. Relying upon these facts, and supposing the vessel had actually sailed, he made no effort to detain her. From all this the referee found that there was no negligence on the part of Staats, and I see no good reason for disturbing his findings. There were sufficient grounds for concluding, in good

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faith, that the vessel had sailed; the facts indicated that she had sailed, and I do not see how Staats could be charged with the want of ordinary diligence in relying upon them. The greatest degree of diligence would, doubtless, have required Staats to have made inquiries for the vessel after he received the dispatch. But he was only bound to ordinary diligence, and I do not see how we can find the want of such a degree of diligence against the finding of the referee, and in favor of a party who, upon this question, has the affirmative. *Hamilton v. McPherson*, 28 N. Y. 76; *Milton v. The Hudson River Steamboat Co.*, 37 id. 210; *Costigan v. The Mohawk & Hudson R. R. Co.*, 2 Denio, 609; *Dorwin v. Potter*, 5 id. 306; *Shearman & Redfield on Negligence*, § 598.

But, aside from this, it is by no means certain that Staats could have obtained the salt from the vessel if he had made the effort. He had made a valid contract to have the salt transported to Chicago, and the other party to the contract had taken possession of the salt, and entered upon the execution of the contract. What right had Staats to take the salt away from him? I know of no process of law by which he could have done it. And what right did the defendants have to ask Staats to violate his contract with that third party, in order to shield it from the consequences of its own wrong. I am, therefore, clearly of the opinion that the alleged negligence furnishes no defense to the action.

2d. It is also claimed that the referee adopted an erroneous rule of damages, and that the plaintiffs should not, in any event, have recovered more than they actually disbursed for freight on the salt to Chicago. The measure of damages to be applied to cases as they arise has been a fruitful subject of discussion in the courts. The difficulty is, not so much in laying down general rules, as in applying them. The cardinal rule undoubtedly is, that the one party shall recover all the damages which has been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. Under this latter rule, speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule, such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, as might natu-

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rally be expected to follow its violation. It is not required that the parties *must* have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may fairly be *supposed* to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of this rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts. In this case, then, in what may properly be called the fiction of law, the defendant must be presumed to have known that this dispatch was an order for salt, as an article of merchandise, and that the plaintiff would fill the order as delivered; and that, if the salt was shipped to Chicago, it would be shipped there as an article of merchandise, to be sold in the open market; and the market price in Chicago being less than the market price in Oswego, that they would lose the cost of transportation, and the difference between the market price at Chicago and the market price at Oswego. I think, therefore, that the rule of damages adopted by the referee was sufficiently favorable to the defendant. The damages allowed were certain, and they were the proximate, direct result of the breach.

I do not think, under the facts of this case, that the plaintiffs, when they found the state of the Chicago market, were bound to reship this salt to Oswego. For any thing that appears in this case, the cost of transportation to Oswego would have been equal to the difference in the market price between the two places. Then there was the risk of the lake transportation at that season of the year, and the uncertainty in the Oswego market, when the salt should again be landed there. If the plaintiff had shipped it, and it had been lost upon the lake, the total loss would not have been chargeable to the defendant. By the wrongful act of the defendant, the salt had been placed in Chicago, one of the largest commercial

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centers in the country, and the plaintiffs had the right to sell it there in good faith, and hold the defendant liable for the loss.

I have, therefore, reached the conclusion, that the judgment must be affirmed; and in reaching this conclusion, I believe I am sustained by principles well settled, and by adjudged cases quite analogous. *Sedgwick on Damages*, 37; *Hadley v. Blazendale*, 9 Exch. 341; *British Columbia, etc., Co. v. Nettleton*, 3 Law Rep. Common Pleas, 399, 408; *Wilson v. The Newport Dock Co.*, 1 Law Rep. Exch. 176; *Griffin v. Colver*, 16 N. Y. 489; *Hamilton v. McPherson*, 28 id. 72; *Kent v. Hudson R. R. Co.*, 22 Barb. 278; *Medbury v. The N. Y. & Erie R. R. Co.*, 26 id. 564; *Scoville v. Griffith*, 2 Kern. 509; *Cutting v. Grand Trunk R. R. Co.*, 13 Allen, 381; *Squires v. Western Union Telegraph Co.*, 98 Mass. 382; *Wenger v. United States Telegraph*, 55 Penn. 262; *N. Y. & Washington Telegraph Co. v. Dryburgh*, 35 id. 298; *Williams v. Barton*, 13 La. 494.

HUNT, J.* As the findings of fact by a referee, when not disturbed by the general term, are conclusive upon this court, we are relieved from any critical examination of the testimony. Some of the important points do, indeed, arise upon undisputed facts, and thus present themselves as questions of law rather than as questions of fact. Code, § 268; 5 Seld. 463.

Of this character is the first point presented, to wit, whether Magill & Pickering were partners of the plaintiffs or were their agents. The referee, in fact and in law, adjudged them to be agents merely. Magill & Co. agreed to receive from the plaintiffs their salt, to sell it in the Chicago market, to render correct accounts of sales, and to remit the proceeds every fifteen days. Their compensation for making the sales was to be one-half of the net profits, after deducting the cost of the salt, freight, insurance, dockage, and interest from day of shipment to the day of sale. There was no agreement that they should bear any portion of the loss suffered. The hazard of loss rested upon the plaintiffs exclusively. This, in law, created an agency, and not a partnership. *Salter v. Ham*, 31 N. Y. 321; *Burckle v. Eckhart*, 3 Coms. 132; S. C.; 1 Denio, 337.

The dispatch in question was forwarded by the agents of the

* The following opinion was delivered by HUNT, J., on the argument at the March term, and adhered to on this argument.—RER.

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plaintiffs in their business, and has been adopted and assumed by them. The plaintiffs are the proper parties to bring this action.

The next and the main question is, upon the liability of the defendants under the circumstances stated. The referee finds, that, in fact and in law, the company receiving the message at Chicago was the agent of the New York company to receive messages for transmission over its wire. He finds this upon the contract, the substance of which is set forth in the preceding statement. He finds, also, that it had upon it a duty to receive and transmit correctly, and that it is liable upon that ground.

The plain and simple rule upon this branch of the case is furnished by the law upon the subject of common carriers. I do not consider a telegraph company subject to the liability of a common carrier, as I shall hereafter show; but I use the case as an illustration. A merchant in New York ships a bale of goods by the People's Line of steamboats, from that city to Chicago. The duty of the People's Line is not themselves to carry those goods to Chicago, but simply to carry them to the end of their route, and then deliver them according to instructions, or, if uninstructed, to some responsible line for further transportation. Their duty is then ended, as is their liability. *Gould v. Chapin*, 20 N. Y. 259; *Ladue v. Griffith*, 25 id. 364; *McDonald v. W. T. Co.*, 34 id. 497. The railroad company, or the canal boat proprietor, to whom they are delivered, upon their receipt, at once becomes liable to the shipper, and so remains until he carries the length of his route, and delivers them to some responsible party for further transportation. When this is done his liability ends, and that of the new carrier commences, upon the same terms. Each carrier, by the receipt of the goods, and the consequent promise to forward them, enters into an agreement with the owner at New York, although he does not meet with him or correspond with him personally, that he will safely carry and deliver the goods, and is liable to the original owner in New York if he fails in his undertaking. Auth., *supra*. The rule and the reason of it are the same in regard to the transmission of telegraphic messages.

A company of this character exists at Chicago, whose own lines extend only to Detroit or Toledo, and then connect with other lines extending to Buffalo; these, in their turn, with lines extending to New York, and connecting with the last line, and lines also extending northerly to Oswego and southerly to Binghamton. It is not the duty of the company thus situated at Chicago, on receiving a

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message for New York, nor does it undertake that it will, by itself, or by its own lines, transmit the message to its final destination. In analogy to the common carriers rule, and upon the good sense of the transaction and the general understanding of the community, it undertakes for care and attention in transmitting it over its own lines, and for its prompt delivery to a competent and responsible company for further transmission. When so delivered, its liability terminates, and that of the receiving company begins. On this point I hold the case to have been well decided by the referee; and, if a liability existed, the defendant was the party upon whom, by law, it rested.

I have examined all the cases cited in the collection of decided cases respecting telegraphic liabilities furnished by the appellants' counsel, and find that these views are sustained in principle by many of them, and not in hostility to any of them having authority. *Stevens v. Montreal Telegraph Company*, 16 U. C. 530.

The third objection presents the question, whether a telegraph company is liable as a common carrier, or whether their liability arises only in the want of proper care and attention.

I can find no authority, and can discover no principle, upon which to charge such a company with the absolute liability of a common carrier. That liability was founded upon the necessities of the case, real or fancied, and has never been applied to any person, or to any occupation, except those of carriers of goods, and innkeepers. The carrier had the exclusive possession and control of the goods, often in secret, away from the supervision of any other person, with opportunity for embezzlement and collusion with evil-minded persons, and without means of discovery by the owner. Especially was this so in the ruder stages of civilization, and before the present modes of communication, rapid and easy, were in existence. It was upon this view, early adopted as a rule of safety to the community, that the carrier should always be *prima facie* liable, in case of non-delivery of the goods, and that he should not be excused for any causes, except those occurring by the act of God or of the public enemies, and these were to be shown by himself.

Whether his liability is based upon the contract he makes, or upon his public duty, the telegrapher does not come within any of these principles. He has no property intrusted to his care. He has nothing which he can steal, or which can be taken from him. There is no subject of concealment or conspiracy. He has in his possession

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nothing which, in its nature and of itself, is valuable. It is an idea, a thought, a sentiment, impalpable, invisible, not the subject of theft or sale, and, as property, quite destitute of value. He cannot, himself, see or hear or feel the subject of his charge. He submits an idea to a mysterious agency, which carries it to its destination, and delivers it to one there at hand to receive it. He is bound to conduct the business appertaining to this pursuit with skill, with care, and with attention. He holds himself out as possessing the ability to transmit these communications, and he undertakes that he can and will transmit and deliver them with the expected dispatch. There may be circumstances in the nature of the instrumentality employed, and the effects to be produced, which, in a particular case, will prevent the proper accomplishment of the undertaking. A thunder-storm, which prevents or renders dangerous the operation of electrical currents or machines; a tempest, which prostrates poles and breaks the wires; or unusual pressure of prior business; the sudden sickness of an operator, or many other causes, might prove a sufficient excuse for the want of a prompt delivery of a message. A message is taken to an office in Buffalo, to be sent to the city of New York, a distance of about five hundred miles, and is accepted. This acceptance implies that the message is to be sent immediately, or certainly within a few hours. The sender can communicate by letter, or go in person, within the space of twelve or fourteen hours; and the object of a telegraphic message is to gain the advantage over the time that would thus elapse. This is understood by all parties, and the sender has the right to rely upon it.

In the present case, the referee has found actual negligence, or want of care, in the defendants' agent at Syracuse. The message, as received at Syracuse from the west, contained an order for 5,000 sacks of salt—a sack containing about fourteen pounds of fine salt. As sent by the defendants' agent, it contained an order for the same number of casks of salt—a cask containing three hundred and twenty pounds of coarse salt. No excuse is given for this error, and no explanation, unless it be only that the characters by which these words are designated nearly resemble each other. No doubt this would furnish a reason why a person ignorant of telegraphic characters, or unskilled in their reading, should misunderstand them. Such are not the persons that the defendants are permitted to employ in this business. Those engaged in it profess to understand the hieroglyphics. They have, themselves, invented or adapted them.

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They are bound, also, to use the machinery which will, in the best and safest manner, deliver to them the expected messages. Careless reading or ignorant management of the machinery is no excuse; it is simply an aggravation of the offense. The negligence was quite enough to justify the action.

The rule of damages adopted by the referee was the most favorable to the defendants of any that could have been applied, unless it should have been held that no recovery could be had beyond the price paid for the message. He gave the difference in the value of the salt at Oswego, on the day of its shipment, and its value in Chicago on the same day, together with the expense of transportation. Nothing was allowed for profits that might have been made on the fine salt ordered, or on the salt at Oswego, if it had not been sent, and no question of a falling market is in the case. The value of the salt at Oswego, where it would have remained except for the erroneous message, as compared with its value at Chicago, where the same error caused it to be sent, with the expense of so sending it, was the smallest allowance that could have been made. The case shows that the salt was actually sold in Chicago at a much greater loss, and that the plaintiffs were at an expense of several hundred dollars in storing the salt at Chicago. These items were not allowed. *Griffin v. Colver*, 16 N. R. 489; *Blot v. Boiceau*, 3 Coms. 78; *Watkinson v. Laughton*, 8 Johns. 213; *Amory v. McGregor*, 15 id. 24; *Richmond v. Bronson*, 5 Denio, 55.

If this is a question of contract, the point of the plaintiff's negligence does not properly arise.

The breach of a contract by one party is not justified by the subsequent negligence of the other party. It can only be important on the question of damages. In actions of tort, where the plaintiff claims for the negligence of another, if he himself has been negligent, and thus contributed to his own injury, he can recover no damages; in every aspect of this point, the decision of the referee, implied in his finding, that there was no negligence on the part of the agent at Oswego, is conclusive. It might or it might not have been in his power to stop the sailing of the vessel on the 27th. It might or might not have cost less to stop it than to allow it to go on. We do not understand the rules regulating this subject, or their effect, as well as did the agent at Oswego, or as did the referee. We must rest upon the decision of this latter.

Judgment should be affirmed, with costs.

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LOTT, J.* The counsel for the appellants, in his points, waives all the points raised by the case except the following:

1st. Whether the plaintiffs were negligent and contributed to their own injury.

2d. Assuming that they were not, and that every other point requisite to sustain their cause of action be in their favor, what would be the proper rule and measure of damages in this case?

They will be briefly considered.

1st. Upon the facts found by the referee, the plaintiffs were authorized to ship the salt ordered to be sent by the telegram delivered to them. I see nothing in the case which can properly charge them with improper conduct in proceeding to execute the order. Nor is there, in my opinion, any thing to warrant the conclusion that they were chargeable with negligence in not stopping the vessel on board of which the salt had been put, and requiring a return thereof.

The referee has found affirmatively that when the dispatch of September 26, 1856, from the plaintiffs to Staats, their agent, apprising him of the mistake in the order of Magill & Pickering, was received, he knew said vessel had finished loading, and supposed she had actually left the Oswego harbor. He also finds, it is true, that it did not appear that he made any effort whatsoever to ascertain or inform himself of the fact as to whether she had actually sailed or was then within the Oswego harbor. The omission of such effort did not constitute negligence. Knowing that the vessel was loaded, and believing that she had left port, and without any fact shown to raise a doubt as to the fact of her having sailed, why should he go on an errand or make an inquiry inconsistent with such belief? I certainly cannot see any rule or principle imposing on him that duty or obligation, and consequently there can be no imputation of negligence for omitting to do an act which he was not bound to perform.

2d. After a careful consideration of the question of damages, I have come to the conclusion that the rule adopted by the referee was correct, or at least as favorable to the defendants as can, upon any principle, be claimed by them. He has not charged them with any damages resulting from the non-fulfillment of the order, as actually given, to "send five thousand SACKS of salt immediately,"

* The following opinion was delivered by **LOTT, J.**, on the argument at the March term, and adhered to on this argument. — **Em.**

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but he has held them responsible only for the loss that has resulted from the order actually given to the plaintiffs' agent, that directed them to "send five thousand *casks*," instead of sacks, of salt: that induced them to ship the salt which was sent and to incur the expense of the transportation thereof; and when it reached where it was ordered to be sent, it was not worth as much in the market there as its value at the port from which it came. If the order had not been given that expense would not have been incurred, and the loss resulting from such difference would not have been sustained. They are, therefore, the direct and immediate consequence or result of the defendant's act, and with those only, and the interest thereon, have they been charged.

It is insisted, and it may be the fact, that if the salt had been sent back from Chicago to Oswego, the loss to the plaintiffs would have been less than the difference in value at those places. I am, however, unable to find any authority in the plaintiffs to return it, much less any duty or obligation to do so. Such return would have been attended with the cost of transportation and the charges incidental thereto, and those would not have been justified by the order; that was fully executed when the salt reached its place of destination in pursuance thereof; and there is no ground for saying that any thing done after its full execution was done in compliance with its terms and direction. It necessarily follows, that the expense incurred thereby would not have been a direct or necessary result or consequence of the defendant's act.

These views lead us to the conclusion that the referee did not err in his decision on either of the two questions now presented for our review, and that the judgment appealed from should be affirmed, with costs.

All the judges concurring for affirmance, except GROVER, J., who thought the rule of damages erroneous,

Judgment affirmed.

NOTE. — As to the nature of the liability of telegraph companies, there are several decisions not referred to in the foregoing opinion. In *MacAndrew v. Electric Telegraph Company*, 17 C. B. 3, decided in England in 1855, it was held that telegraph companies stand in the same position as common carriers of goods; and, in the absence of express stipulations to the contrary, are liable as insurers; but it may be fairly doubted whether the question arose in the case. In the case of *Parks v. Alta California Telegraph Co.*, 13 Cal. 422, the supreme court in that state held that telegraph companies are, in contemplation of law, common carriers, and are subject to the rules of law governing the same. So in *Rittenhouse v. Independent Telegraph Line*, 1 Daly (N. Y. Com. Pleas), 475, the defendants were held liable for damages sustained by plaintiff through a mistake in the transmission of a message, although it did not appear how the mistake had occurred, or that the defendants had been guilty of negligence.

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There is another class of cases which hold telegraph companies to be analogous to common carriers, though not absolute insurers, and liable for a failure to exercise the utmost diligence and skill. Such are the cases of *The New York & Wash. Tel. Co. v. Dryburg*, 35 Penn. St. 296; *Bowen v. Lake Erie Telegraph Co.*, 1 Am. Law Reg. 688; *Stevenson v. Montreal Telegraph Co.*, 16 U. C. 580; *De Rutte v. New York, Albany & Buffalo Tel. Co.*, 1 Daly (N. Y. Com. Pleas), 54. In all these cases telegraph companies are charged with the presumption of negligence in case of error or delay in the transmission or delivery of messages, but are exonerated where such error or delay results from atmospheric or other causes over which human agency has no control.

A third class of cases hold telegraph companies liable only for want of reasonable diligence and skill. *Washington & New Orleans Telegraph Co. v. Hobson*, 15 Gratt. 123; *Birney v. New York & Washington Telegraph Co.*, 18 Md. 341; *Brace v. United States Telegraph Co.*, 45 Barb. 375; *Ellis v. American Telegraph Co.*, 13 Allen, 226; *Western Union Telegraph Co. v. Carver*, 15 Mich. 525.

In several of the cases above cited the action was brought by the receiver of a message for injuries sustained by him from an error in transmission: but in a recent English case (*Playford v. The United Kingdom Telegraph Co.*, 2 Albany Law Journal, 386) the court of queen's bench held that the person to whom a message was sent by telegraph had not such an interest in the contract for transmission as would enable him to maintain an action for damages sustained by him from the company's mistake. — *Emr.*

HERRICK v. WOOLVERTON, appellant.

(41 N. Y. 581.)

Promissory note — payable on demand, with interest — when due as between maker and holder.

The rule, that a promissory note, payable on demand, with interest, is a continuing security, does not apply between holder and maker.

Therefore, a note, payable on demand, with interest, transferred nearly three months after date, is past due when transferred, and subject to all the defenses that would have been available if the suit had been by the original payee. (LOTT and SUTHERLAND, JJ., *dissentiente*.)

APPEAL from an order of the supreme court, at general term, granting a new trial on a verdict in favor of the defendant.

The action was brought upon a promissory note, bearing date February 9, 1861, for the payment of the sum of \$1,500, with interest, on demand, to the order of H. D. Hawkins, and signed by the defendant. On the day of its date, the note was indorsed by Hawkins, and delivered by the defendant to Jonathan R. Herrick, who was the real payee or first holder, and who held it till the last of April or first of May, 1861, when he transferred it to the plaintiff.

It appeared from the evidence that the note was executed and delivered by the defendant to Jonathan R. Herrick, on a transfer to him by the latter of fifty shares of the capital stock of the Bank of

Albany. The defendant claimed, and his evidence tended to show, that the transfer of said stock was a mere loan of the same by Jonathan R. Herrick to defendant, and that the note was made as a memorandum by way of security for the return of the stock, and for no other purpose; and that the defendant, before the commencement of the action, duly tendered the stock to Jonathan R. Herrick and demanded the note, which was refused.

The plaintiff's evidence tended to show that the transaction was a sale of the stock, and that the note was given for the purchase-price.

There was no evidence that the plaintiff had notice, at the time he received the note, of the defendant's claim, or that he, the plaintiff, paid a valuable consideration for it. All the parties resided in the same city, and did business in the same street.

The court instructed the jury, that the plaintiff, having taken the note nearly three months after its date, and living in the same city, and doing business in the same street, with the other parties, was bound, at his peril, to make inquiries as to the note, and that the note was open to any defense existing between the original parties; and refused the plaintiff's request to charge, that the note, being payable on demand, *with* interest, was a continuing security, and, as such, not due till demand actually made.

The jury found a verdict for the defendant, and the plaintiff appealed.

John H. Reynolds, for appellant, cited *Haxton v. Bishop*, 13 Wend. 13, 21; *Sice v. Cunningham*, 1 Cow. 397, 407; *Thompson v. Ketchum*, 8 Johns. 190; *Gaylord v. Van Loan*, 15 Wend. 308; *Edwards on Bills*, 156; *Loose v. Durkin*, 7 Johns. 70; *Hendrick v. Judah*, 1 id. 319; *Furman v. Haskins*, 2 Caines, 369.

Henry Smith, for respondent, cited *James v. Chalmers*, 2 Seld. 214; *Pratt v. Adams*, 7 Paige, 616; *Nelson v. Cowing*, 6 Hill, 339; *Barrough v. White*, 6 Dow. & Ry. 379; *Wethey v. Andrews*, 3 Hill, 582; *Merritt v. Todd*, 23 N. Y. 28; *Scovil v. Scovil*, 45 Barb. 517, 523, 524; *Payne v. Gardiner*, 29 N. Y. 146, 172, 173; *Payne v. Slate*, 39 Barb. 634, 640-642; *Weeks v. Prior*, 27 id. 80, 81.

FOSTER, J. The jury having found that the transaction between the defendant, who was the maker of the note, and Jonathan R.

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Herrick, who was the real payee or first holder, was a mere loan of the bank stock from the latter to the former, and that the note was made as a memorandum by way of security for the return of the stock, and for no other purpose, they virtually found that the paper, though in form a promissory note, was never intended as such between them; that it was issued to be used only for the purpose above specified, and was never intended by them to be issued, used or circulated as a *promissory note*, and, doubtless, as between them, it could not be claimed to be such; at least, unless default should be made by the defendant in the return of the stock, and it cannot be claimed, upon the evidence in the case, that such default had been made.

An important inquiry, therefore, is, whether, at the time the note was transferred from the payee to the plaintiff, it had become due, in such sense as to be dishonored; for, if it was, then the plaintiff took it subject to all equities between the plaintiff and maker, and he could not recover upon it, even though he took it without any actual notice of the defense, and for a valuable consideration; for, in such case, the law implies notice to him of all existing equities or defenses which the maker had to it as against the payee, and such presumption is conclusive.

If, therefore, the note was dishonored when the plaintiff received it, the charge of the judge, and his refusal to charge as requested by the plaintiff's counsel, were correct. This proposition of law is not disputed, and is well established.

The uniform current of authority in this state was, that a note, payable on demand, must be presented within a reasonable time, or it would be deemed due and dishonored, so that a subsequent transferee would take it subject to all equities existing between the original parties; and that the rule applied, whether the note was payable *with interest* or not. *Furman v. Haskins*, 2 Caines, 369; *Lossee v. Durkin*, 7 Johns. 70; *Sice v. Cunningham*, 1 Cow. 397 (where the same rule was held between subsequent holder and indorser). And *Wethey v. Andrews*, 3 Hill, 582, gives the same rule as applicable to notes on demand, *with interest*; holding that a note on demand, with interest, is a lasting security, but applying the rule to it that the demand must be made within a reasonable time; and says, that notes on demand, without interest, are due immediately.

The rule, as to reasonable time, which has been applied to such notes, has been quite different from the rule, in that respect, appli

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cable to checks, as between drawer and holder, and to drafts, or bills of exchange, as between drawer or indorser and holder, which requires them to be presented without delay. The rule as to such notes requires them to be presented within such time as, under all the circumstances of the case and the situation of the parties, the court shall adjudge, as matter of law, to be reasonable between them. In *Furman v. Haskins*, the note was held dishonored where the transfer was made eighteen months after its execution. In *Losee v. Durkin*, where no special circumstances appeared, the court held, where the note was transferred two and a half months after it was executed, that, in an action brought thereon by the transferee, the maker might prove a payment, made while it remained in the hands of the payee, and in that case the note was made payable *with interest*.

In *Sice v. Cunningham*, where the action was by the indorsee against the indorsers, it was held, that a note payable on demand, was due presently, and must be demanded within a reasonable time, and that a delay of five months in making demand of the maker, discharged the indorser; and the court also held, that proof of a parol agreement to vary the time of payment fixed by the note, could not be received.

In *Wethey v. Andrews*, the supreme court, for the first time, noticed any distinction between demand notes, with, or without interest. That was an action of the subsequent holder against the maker of a note on demand with interest. It was transferred from the payee to one Grimshaw, a purchaser thereof, within a week after it was executed; and within about a month after its execution, he transferred it to the plaintiff, who paid him the money for it. The defendant, the payee, and the first transferee, all lived in the same village, and the plaintiff lived within two and a half miles of them; and the defense offered was, that the note was executed without consideration. The plaintiff recovered, the court holding that the cases furnish no principle for fixing the time with exactness, when a negotiable note, payable on demand, shall be deemed dishonored, so as to let in a defense against the payee, as against one to whom it has been negotiated; that the note was *with interest*, and came to the hands of the plaintiff some four or five weeks after it was executed, and that no law adjudges such a note to be dishonored so soon after its date. In delivering the opinion, COWEN, J., says, in substance, that, if the note had not been on interest, he should have

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thought it right to presume it had been demanded and payment refused, perhaps even at the time when Grimshaw obtained it; but he thought the contrary was to be presumed with regard to one which bore interest, and thought it would be contrary to the general course of business to demand payment short of some proper time for computing interest. He also cited the case of *Barough v. White*, as reported in 6 Dowl. & Ryland, and in 4 Barn. & Cress., as showing that such a note in England is considered as a continuing security, and is not dishonored until payment is demanded and refused; but we are not informed that the court adopted that rule, and the whole case shows that it was meant to decide, only that such a note is not due or dishonored immediately.

Now, the precise question before the court in *Wethey v. Andrews* was, whether, in an action by a subsequent holder upon a note on demand, with interest, transferred by the payee *within a week* after its inception, the maker could set up the defense existing between him and the payee that the note was without consideration, upon the sole ground that it was dishonored by the delay of a week without demand for payment. The court was, doubtless, correct in its decision, and correct in saying that there was no case holding such a note to be dishonored; and in that respect I think there is no distinction, in the cases to which the court alluded, between such notes and those payable on demand, without interest; for I am not able to find any case which declares a note on demand, without interest, dishonored by not being demanded or paid within a week after it is executed; and although, in the opinion, the judge treats the case as though the material transfer took place four or five weeks after the making of the note, it is actually certain that no such question was involved; for it is perfectly clear, upon principle and authority, that if the transfer to Grimshaw was before the note was dishonored, the subsequent holder would succeed to all his rights as between him and the maker, irrespective of all questions of notice to or of valuable considerations paid by such subsequent holder. It would seem that the judge supposed that the rule held in the case of *Barough v. White*, which he cited, was different in England in regard to notes on demand, *with interest*, from what it was in regard to demand notes not on interest; and, if so, I think he was mistaken. But whether the *opinion* expressed by the judge in *Wethey v. Andrews* was correct or not, it must be conceded that the law of that case was correctly decided.

The supreme court, in the case at bar, followed what was supposed to be the principle adopted by this court in the case of *Merritt v. Todd*, 23 N. Y. 28. It is, doubtless, true, that this court held, in that case, that a promissory note, payable on demand, with interest, is a continuing security; that the indorser remains liable until an actual demand of payment; and that the holder, as between him and the indorser, is not chargeable with neglect for omitting to make such demand within any particular time; and whether the reasoning upon which the decision was based be correct or not, such is the decision of this court. It, however, only *decides* what the law is between holder and indorser; and the chief judge, in his opinion, discriminates between that case and such as the one before us, and says: "It may be well to observe that the present question is not identical with the one which arises when, after the transfer of such a note, the maker seeks to introduce a defense existing against the first holder. The lapse of time, or the non-payment of interest after the regular period, or periods for such payment, have passed, may be sufficient to put the purchaser on inquiry, or to justify a presumption that the instrument was actually dishonored before the transfer. It might well be true, in such a case, *that a demand had been actually made and notice given to the first indorser, so as to charge him, while at the same time the maker would be let in to defend, if he had any defense.* Questions of charging the indorser, therefore, and questions of allowing an original defense to the maker, may depend on very different considerations." In other words, that, as to the maker, the note might be considered dishonored, while, at the same time, as between the holder and indorser, the former has been guilty of no laches.

It is clear to my mind, that this court did not intend to decide what the rule should be as between maker and holder, but only as between holder and indorser, and, therefore, it cannot be claimed, as the supreme court seemed to suppose, that their decision in the case before us was required, and controlled by the case of *Merritt v. Todd*. Nor does it prevent us from determining the questions presented here, according to the decisions in other analogous cases. In fine, it *decides* nothing in regard to such notes, as between maker and holder; and I am not aware of any case in this court, or the supreme court, except the decision in this case of the court below, which, in terms, dissents from the ruling in *Losee v. Durkin*, or attempts to overrule it; and that case, which was decided in 1810.

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held that such a note as this was dishonored when it had been held by the payee for two months and a half, so as to let in the defense against the subsequent holder, of payment to the first holder, while he owned the note.

It may be, that, as against an indorser of such paper, he may be holden, though the maker should have a defense arising between him and a first holder of it, for the reason, that by indorsing the note, he submits his liability without any certain, fixed limits as to time, and, to some extent, consents to have his rights affected by the action of both maker and holder, even though as between *them*, it is due at once, so that the maker may pay it at any time; and the holder may demand payment, or sue the maker without demand at any time; that, having indorsed such paper, he has no right to complain that neither of them have taken such steps as to retire the note, or fix his liability at an earlier day.

It must be conceded, that under the rule which has obtained in this state, there has always been some doubt and uncertainty when such a note as this would become dishonored by want of demand or non-payment; but such uncertainty need not subject parties to any risk, where due caution is exercised.

I think it is not correct to say that such notes are *intended* for circulation from hand to hand as commercial paper. It is true that they do so circulate to some extent; but, generally, the notes which are issued and used for circulation are payable at a day certain, and in regard to which all the parties know when and how the liabilities of indorsers are to be fixed or discharged.

There is no good reason why such notes should circulate as commercial paper, any more than that paper payable at a time certain, and which is past due, should perform that office; for both alike must be paid whenever the holder requires it. And why should either kind be circulated? The obligation of the maker of either has matured, or, at furthest, matures on demand, which in both cases may be made at once; and if the holder wants to raise money on them, why not apply for payment, and receive it from the party from whom it is due, instead of selling it to some one else, who may the next moment make such demand? The very fact, that the holder of such paper offers it for sale or circulation, seems to imply that there is some reason, not apparent, why he does not demand its payment of the maker. And, surely, no one can doubt that such

paper is legally payable immediately after it is issued, if the holder demands it.

Independent of authority, the application of the rule which is held between holder and indorser in *Merritt v. Todd*, to the case of holder and maker, would leave the time when the note would be payable quite as uncertain as it would be when it becomes dishonored under the rule as claimed by the appellant, while all the maker's actual intentions in issuing the paper might be frustrated; and he must have no right to pay it until the holder chooses to demand it. For it cannot be that such note, as against the holder, is not payable until he chooses to demand it, and that, at the same time, the maker may pay it when he pleases. The rule adopted in *Merritt v. Todd*, as applied to the indorser, is, that the note is due *only on actual demand*, and, if it is applied as against the maker, it must be accompanied with all its legal consequences; and, of course, while the holder can require payment sooner or later, as he chooses, the only certainty on the part of the maker is, that he must be certain to have the money ready whenever it is called for, and yet continue liable to pay interest, without any right to compel the holder to receive payment until he chooses to do so. And, while such rule will enable the holder to carry out any intention that he may have had, to loan his money for such a time as is usual when made on the security of commercial paper, it affords no safeguard against a change of such intention on his part, and leaves any such intention of the maker without any protection whatever; for the note is due when demanded. The holder may be as vigilant or negligent as he pleases. The maker and indorser are bound to wait his time; and the only law of the case is his will. If we adopt it in this case, we should change the well-established principle, that, as to such a note, the statute of limitations commences to run from its date, so that it should commence only from the time of demand made, and thus add still further to the security of the holder, and to the prejudice of the maker.

I think the case of *Merritt v. Todd* has extended the principle of continuing security in such a case to the very verge; and that to apply it between holder and maker would be putting the maker in the power of the holder to an extent which is entirely unnecessary. If it is the intention of the parties that paper executed between them shall be a continuing security, and, as a promissory note, for a term of time at which interest is usually computed, it is such

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oetter that the paper should be made in such form as shall evidence such intention more clearly, and give to the parties the benefit of it, than to change the law so as to benefit the holder only.

In this country the law is, that a promissory note, payable on demand, unless demanded within a reasonable time, is considered as overdue and dishonored. *Ranger v. Cary*, 1 Met. 369; *Croswell's Executors v. Arrot*, 1 Serg. & Rawle, 180; *Loomis v. Pulver*, 9 Johns. 244; *Van Hoesen v. Van Alstyne*, 3 Wend. 75, 79. And the rule is the same, even if expressed to be payable with interest. *Thompson v. Hale*, 6 Pick. 259; *Sylvester v. Crapo*, 15 id. 92; *Newman v. Kettelle*, 13 id. 418; *Wight v. Foster*, id. 419; *Nevins v. Townsend*, 6 Conn. 5; *Losee v. Durkin*, and *Sice v. Cunningham*, *infra*. And as, in this state, no absolute measure of this reasonable time has been fixed, a day or two (*Field v. Nickerson*, 13 Mass. 131, 137), seven days (*Thurston v. McKenn*, 6 id. 428), and even a month (*Ranger v. Cary*, 1 Met. 369), is not too long; while eight months (*American Bank v. Jenness*, 2 Met. 288; *Ayers v. Hutchins*, 4 Mass. 370); three months and a half (*Stevens v. Brice*, 21 Pick. 193); and even two months and a half (*Losee v. Durkin*, 7 Johns. 70, and *Sice v. Cunningham*, 1 Cow. 397, 404), have been deemed sufficient to discredit a note.

The statute of limitations commences to run from the date of a note payable on demand, whether without interest (*Newman v. Kettelle*, 13 Pick. 418; *Larson v. Lambert*, 7 Halst. 247; *Kingsbury v. Butler*, 4 Vt. 458), or whether it be *with interest* (*Mason v. Mohawk Ins. Co.*, 13 Wend. 267).

COWEN, J., in *Wethey v. Andrews*, and the chief judge, in *Merritt v. Todd*, appeared to suppose, that, in regard to the time when demand notes became due, there was a difference in England between those payable with interest and those on demand merely. And yet, I think, it will be found that no such distinction prevails there.

Formerly, notes on demand were held to be due immediately. *Copp v. Doncaster*, Cro. Eliz. 548; where it was contended that the word "demand" was parcel of the contract, so that the money was not due until demand, and that a demand by bringing the action would not do; but the court said, the duty of payment was "a duty maintenance, and, therefore, these need no demand, as in other cases." *Remhall v. Boyle*, 10 Mod. 38. Where, in an action upon a note payable on demand, it was moved, in arrest of judgment, that no demand was alleged in the declaration; but the court held it to be

a debt *in presenti*, and that it was a debt plainly precedent to any demand. *Collins v. Deming*, 3 Salk. 227, decides the same point, and also holds that the statute of limitations commenced running from the date of the note. And 15 Viner's Abr. 103, note, is to the same point.

It is assumed that the rule in England now is, that a note payable on demand, with interest, is a lasting security, and is not dishonored until payment is demanded. In *Barough v. White*, as reported in 4 Barn. & Cres. 325, which contains a report of what was said by each of the judges, the question was, whether, in an action brought by a subsequent holder of a note on demand, with interest, for which he had paid value, the maker should be allowed to prove the declarations of the first holder, while he owned it, that he gave no consideration for it to the maker. It was held, that such declarations could not be given. And BAILEY, J., in his opinion, says: "In this case no demand was proved, and the note being made payable, *with interest*, to Arnott, or order, makes it probable that the parties contemplated that the note should be negotiated for some time." And he also said, that the defendant did not identify the first holder with the plaintiff, and that for these reasons the evidence was properly rejected. The three other judges placed their decision on the ground that the declarations of a prior holder of a note cannot be given in evidence against a subsequent one, but that such alleged facts must be established by other proof. And such is the well-settled law in this state. It is true that LITTLEDALE, J., also said he thought the note not overdue, and that it seemed to him that it was a lasting security. He, however, does not allude to the fact that it is with interest; and HOLROYD, J., says it was not overdue; "for a note, payable *on demand*, is not open to the same suspicion as a note overdue which is made payable at a particular time." In *Brooks v. Mitchell*, 9 Mees. & Wels. 15, it was decided, that a promissory note, payable on demand, with interest, was not to be treated as overdue, so as to affect the indorsee with any equities against the indorser, merely because it was indorsed several years after its date. Not an allusion is made by any member of the court that the note was on interest; and PARKE, B., reiterates the assertion, that a promissory note, payable *on demand*, "circulates for years," and "is current for any length of time." And the syllabus of the case takes no notice that the note was with interest.

But I have said, that in England there is no difference, in this

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respect, between notes on demand with interest, and notes on demand, merely. And I think the manner in which these two cases are treated by the judges, shows that they understood the rule to be, and that they were only applying the same rule to these notes, which they considered applicable to all other notes payable on demand. In *Haywood v. Watson*, 4 Bing. 496, the action was against the maker on a note, as follows: "On demand, I promise to pay to Cyrus Morrell, or order, £1,000, value received," which passed to the plaintiff as subsequent holder long after it was executed, and the defendant attempted to set up a defense to it as against the first holder. But the court ruled that the plaintiff was entitled to recover, on the ground that, when the plaintiff took the note, it was not dishonored. And PARKE, J., said: "For though the note was made in 1824, it was payable *on demand*, and, therefore, could not be esteemed over due till demand had been made." And the note was not with interest. I do not know how the English decisions on this subject are to be reconciled, for these cases hold, in conflict with the previous decisions, that all demand notes are continuing securities, and are not over due or dishonored until actual demand, and yet they continue to decide that the statute of limitations commences to run against them from their date. *Norton v. Ellam*, 2 Mees. & Wels. 461. The action was on a note by which the maker promised to pay £400 on demand *with simple interest*, and the only question presented to the court was, whether the statute ran from the date of the note or from the time of the demand. The counsel attempted to draw the distinction that the note was payable *with interest*, and, therefore, could not be due immediately; but the court of exchequer unanimously repudiated the idea, and say: "Then is there any difference when it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*." And as to notes payable on demand that do not stipulate for interest, the English decisions are uniform in declaring that the statute commences to run from their date.

I think, upon principle and authority, the note in question was dishonored at the time it was transferred to the plaintiff; and that neither the wants or convenience of business call for any change of the rule.

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The charge of the judge, therefore, and his refusal to charge as requested, were correct. The order of the general term should be reversed and judgment rendered for the defendant on the verdict.

EARL, C. J. If this action had been brought at any time before the case of *Merritt v. Todd*, 23 N. Y. 28, the law, as it was understood to be settled in this state, would have required a judgment for the defendant. That case is understood to be a departure from every case in this state previously decided upon the same point, and to have laid down a new rule. However much we may differ with the learned judge who wrote the opinion in that case, as to the propriety of the rule laid down by him, it is better to adhere to it than to unsettle the law by bringing that decision in question. When, however, it shall come to be understood among commercial men that, as against an indorser, this decision means that a demand note will never become due, however long the lapse of time, until payment has actually been demanded of the maker, very few persons will be found willing to indorse such notes, and they will substantially go out of use.

But the case of *Merritt v. Todd* did not undertake to lay down any rule to govern actions by the holder of a demand note against the maker, and it recognized a distinction between such an action and an action against the indorser. The indorser can be made liable only after a demand of the maker; and as no time for the demand is specified in the note, according to that decision, it may be made at any time, at the option of the holder. But as against the maker, no demand is necessary before suit. As to him, it is due, and may be sued at any time without previous demand. Such notes are usually temporary shifts, the common understanding being, that the holder may demand payment at any time, and the maker may pay at any time. They are given, not to be paid immediately, but with the understanding that they are to run a brief period for the convenience of the parties. Hence, the courts have held that such notes are not dishonored at once, but that they may run a few days, a few weeks or a few months, depending upon the circumstances of each case, before they shall be deemed dishonored, so as to let in a defense on the part of the maker, which he could not set up against a *bona fide* holder, who took the note before it was dishonored. It might have been a better, and would have been a more certain rule, to have held these notes due and dishonored at once,

so that they could not be transferred at any time, so as to cut off any defense of the maker. But the rule has been settled otherwise and acted upon in this state from the foundation of our government, and it is better to adhere to the rule than to unsettle the law by making a new one.

I have thus far alluded to the law as settled before the case of *Merritt v. Todd*, and I have noticed the fact that that case did not profess to change the rule as against the maker of such a note. I will now call brief attention to the cases bearing upon this point, decided in this state since that case. In the case of *Payne v. Gardiner*, 39 Barb. 634 and 29 N. Y. 146, the action was upon an instrument, as follows:

"[\$1,000.]

NEW YORK, 9th of May, 1848.

"Received from Captain William H. Payne, one thousand dollars, which is to his credit on our books at six per cent interest.

SLATE, GARDNER & HOWELL."

It was held that the receipt was evidence of a deposit of money, and that the money thus deposited, like any other mere deposit, could not be recovered until after demand of payment. In *Scovil v. Scovil*, 45 Barb. 634, the action was upon a promissory note, payable on demand with annual interest. The defense was, the statute of limitations. Judges MORGAN, MULLIN and BACON wrote opinions, and the two former, assuming that the statute commenced to run at the date of the note, held that it was not barred; but Judge BACON held that the statute did not begin to run until the payment of the note had actually been demanded. He professed to follow a decision in the third judicial district, which is supposed to be the case which we are now called upon to decide. He laid stress upon the fact that that note was payable on demand with *annual* interest, and inferred that the parties intended that the note should run at least one year. But it does not appear that the other two judges concurred with him. In *Howland v. Edmonds*, 24 N. Y. 307, it was held that a note, payable on demand, might be prosecuted immediately without a demand, and hence, that the statute of limitations began to run on such a note at its date. In *Hirst v. Brooks*, 50 Barb. 334, the action was upon two promissory notes payable on demand, *with interest*, dated, one in 1841 and the other in 1842. The action was commenced in May, 1866. No demand of payment upon the notes had been made until just previous to the commence-

ment of the action. Interest had been paid upon the notes in 1844, more than twenty years before the action was commenced. The defense was the statute of limitations, and the court held that the statute upon such notes begins to run from the date of the notes and sustained the defense. These are all the cases decided in this state since the case of *Merritt v. Todd*, to which our attention has been called, and it will be seen that none of them go far enough to sustain the decision of the general term in this case.

I do not perceive how the fact, that the note is payable with interest, can make any difference with the question we are now considering. A note simply on demand will not draw interest. *Bishop v. Truffin*, 1 Daly, 155; *Purdy v. Phillips*, 1 Kern. 406; *Edwards on Bills*, 712; *Smith's Merc. L.* 526; 2 *Parsons on Notes and Bills*, 393. As demand notes are always expected by the parties to run for a brief time, the sole object of making them payable with interest is to save the interest. To hold that the words "with interest" makes that a continuing security which without them would not be, is to give these words an unnatural meaning, and an effect beyond the purpose of the parties. In *Morey v. Wakefield*, 41 Vermont 24, decided in 1868, it was held that a promissory note, payable on demand *with interest*, and negotiated to an innocent holder for value, two months after its date, was past due when negotiated, and subject to all defenses that would have been available if the suit had been by the original payee.

I am, therefore, of the opinion that the order of the general term should be reversed, and that the defendant should have judgment upon the verdict in his favor.

GROVER, J. The exception to the testimony given by the defendant upon his being recalled was not well taken. It does not appear to have been material to any issue between the parties. The stock for which Herrick said he was offered ninety-five or ninety-six cents, and which the defendant told him he had better sell, does not appear to have been the stock transferred to the defendant, in respect to which the issue between the parties was, whether it had been borrowed by the defendant of Herrick, and the note in suit given as a security for the return of a like amount of stock, or whether it had been purchased by the former of the latter, and the note given for the purchase price. Although the testimony was incompetent, the plaintiff could not have been prejudiced by it. The principal ques-

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tion is, whether a note payable on demand, with interest, transferred nearly three months after date, is subject, in the hands of the holder, to a defense existing in behalf of the maker against the payee previous to such transfer. In the present case, it may be remarked that the parties were engaged in business in the same street in Albany, and that the note must be regarded, therefore, as dishonored after the lapse of three months, if it would be so after the lapse of six or nine. Upon the part of plaintiff, it is insisted that the note, being made payable upon interest, shows that the parties intended that it should not be presented for payment immediately, but rather held as an investment during the pleasure of the parties, the holder having the right to require payment at any time he chose, and that, therefore, the note was not to be considered as dishonored until an actual demand of payment. It is conceded by the counsel that the earlier cases in this state are in conflict with this view, but the following are relied upon as establishing its correctness by authority: *Wethey v. Andrews*, 3 Hill, 582; *Barough v. White*, 6 Dowling & Ryland, 379; *Merritt v. Todd*, 23 N. Y. 28; *Scovil v. Scovil*, 45 Barb. 517; *Payne v. Gardiner*, 29 N. Y. 146; S. C., 39 Barb. 634, and *Weeks v. Prior*, 27 Barb. 80. In *Wethey v. Andrews* it was held that a defense of the maker of such a note against the payee could not be interposed against the holder when the note was transferred within a week from its date. I say within a week, for the reason that the case shows that the note was so transferred by the payee to one Grimshaw within that time, who transferred it to the plaintiff in about four weeks thereafter. It is clear that the plaintiff acquired, by his purchase from Grimshaw, all his right of recovery upon the note, unaffected by the lapse of time while the note was in his hands. It is true, that, in the opinion of the court, it is assumed that the note was transferred four or five weeks after date, and the doctrine contended for by the plaintiff is pretty broadly, though somewhat cautiously, asserted. It is said, that it would be contrary to the general course of business to demand payment (of such a note) short of some proper point for computing interest, such as a quarter, half year, year, etc. What would be a proper point for the computation of interest is not determined; but I think that would be found to be any period from one day and upward. This case does not profess to overrule *Sice v. Cunningham*, 1 Cowen, 397, nor any of the class of cases upon which that was decided; nor is any such design inferable from the opinion.

On the contrary, that and several other cases, decided upon the same principle, are quoted without any criticism or expression of dissent. *Barough v. White*, as reported by Dowling & Ryland, fully sustains the position of the plaintiff in the present case, the judges, in their opinions, respectively sustaining it; but as reported (4 B. & C. 325), Littledale, only, places the judgment upon this ground. There was another ground upon which the judgment might clearly have been given: that is, that no competent proof was offered of any defense against the payee. In *Merritt v. Todd* it was held by this court, that as to an indorser of a note payable upon demand, with interest, such note was a continuing security, and that laches could not be imputed to the holder by delaying to demand payment and giving notice to the indorser for any particular time, and that the indorser continued liable until such demand made. This case clearly overrules *Sice v. Cunningham*; for although, in the opinion of the court, in the latter case nothing is said about the note being payable with interest, yet the amount of the verdict, compared with the sum specified in the note, and its date, shows that such was the fact. The learned judge who gave the prevailing opinion in *Merritt v. Todd*, admits that there was great uncertainty as to the rule of law applicable to the case, and with his usual ability reviews numerous cases in England, and in this and other states, involving the point, and shows that there is not only a want of harmony in the cases, but also soundness in the principles upon which many of them were decided. He shows clearly that upon principle it must be held, as to an indorser, either that the note is a continuing security, and laches not imputable to the holder for delaying to demand payment for any particular length of time, or that the indorser is discharged by any such delay as would exonerate the drawer or indorser of a sight draft.

He adopted the former view, in which five of the other judges concurred, deciding the case upon that ground. This upon a commercial question of much practical importance must be regarded as settling the question in this state. But the learned judge, in the opinion, says that it may be well to observe that the present question is not identical with the one which arises when, after the transfer of such a note, the maker seeks to introduce a defense existing against the first holder. The lapse of time, or the non-payment of interest, after the regular period or periods for such payment have passed, may be sufficient to put the purchaser upon inquiry, or to

justify a presumption that the instrument was actually dishonored before the transfer; and he further remarks that the question of charging the indorser and question of allowing an original defense to the maker, may depend on very different considerations. This shows that it was not intended to determine any thing affecting the latter class of questions. In *Scovil v. Scovil*, the question was not necessarily involved, and is only alluded to and discussed in one of the three opinions delivered. This case can hardly be said to be any authority upon the point. The question in *Payne v. Gardiner* was, whether the action was barred by the statute of limitations. The action was upon an instrument as follows: "Received from Capt. William H. Payne one thousand dollars, which is to his credit on our books at six per cent interest."

This, in the supreme court, was construed as evidencing a loan or deposit of money on time, to be determined by an actual demand of payment thereafter. It is true that, in the opinion, it is stated that the case of *Merritt v. Todd* had wrought a great change in what had theretofore been deemed by the profession as the law of promissory notes payable on demand with interest; but we have seen that the only point determined by that case was, that the holder of such a note was not chargeable with laches as to an indorser by delay in demanding payment, for the reason that the presumption from the paper was that the indorsement was made with the understanding that such demand would not presently be made. If the instrument is regarded as evidence of a deposit of money upon interest, it is clear that no action could be maintained thereon until an actual demand of payment, and that the statute would not commence running until such demand made. When the case came before this court (29 N. Y. 146), Judge MULLIN, in his opinion for affirmance, ably examines the distinction between a loan and deposit of money, arriving at the conclusion that this was a deposit and not a loan, and therefore that the money was not payable until an actual demand made. After arriving at this conclusion, he proceeds to state that it was held in *Merritt v. Todd*, that such a note was a continuing security and was not dishonored until after an actual demand. He then correctly argues, that if a demand was necessary to fix the time of payment, the statute only commenced running from the demand. DENIO, chief judge, voted for affirmance, upon the ground that a payment of interest proved was an answer to the statute, but argued, with the dissenting judges.

that no demand of payment was necessary. Four of the remaining judges were for affirmance, but upon what ground does not appear. I think it clear that this case is no authority for holding that a note payable on demand with interest is not due until an actual demand made.

In *Clarke v. Crandall*, 27 Barb. 77, it was held that a note promising to pay a specified sum to the payee or bearer with use, and transferred within three days from date, was, in effect, payable upon demand, and not to be deemed due at the time of its transfer so as to subject it to a set-off against the maker. I think there is nothing in the foregoing cases, or others, requiring us to hold that a note payable upon demand with interest, is not presently due without any previous demand. I am unable to see any valid ground for making a distinction in this respect between a note so payable with or without interest, except as to an indorser as to whom it was well said in *Merritt v. Todd*, that he cannot complain of delay in making demand, for the reason that he was notified, by the paper itself; that it was intended that the note should be retained by the holder for interest to accrue thereon, and that his assent that it should be so retained was thereby implied. But no such reason applies when the holder offers to transfer the note. Then it is certain that he does not wish to retain it longer for any such purpose, but to realize the amount thereof. Then why not demand payment at once of the maker? is an inquiry naturally suggested to the mind of any person to whom it is offered. It is due, and the money may at once be had thereon unless some obstacle exist that would, if known, be destructive of its negotiable character in the course of business. The note is due without any demand, or it is never due until demand made, and the maker has no right to make payment in its absence; for no tender can be made upon a demand until it is due. The statute of limitations commences at its date, or it never commences until demand made, and a recovery can be had upon such a note against the representatives of a maker after the lapse of any length of time, unless they are able to prove that an actual demand was made more than six years before the commencement of the action. The non-payment of interest furnishes no presumption in favor of the defense, for that is not due until demanded, any more than the principal. Such a note does not come within the statute creating a presumption of payment, for that only applies to judgments and sealed obligations, and to these, only after the lapse

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of twenty years from the time when the money has become due thereon. In short, the doctrine contended for by the plaintiff, making such notes continuing securities, creates a class of obligations that the debtor can only discharge at the pleasure of the creditor, ever liable to instant payment at his like pleasure, and which no statute of limitations will ever bar. No such doctrine has ever as yet been held by this court, and the entire current of decisions in this state, from the earliest reports, is against it. In *Howland v. Edmonds*, 24 N. Y. 307, the doctrine was reiterated by this court that a note, payable by its terms upon demand, might be prosecuted immediately, no previous demand being necessary. True, it is said, as in some other cases, the suit itself being a sufficient demand. This is only saying that the note is due without any demand; for no rule is better settled than that a debt must be due at the time of the commencement of the action, or the plaintiff will be nonsuited. It is likewise held in this case that the statute of limitations commences running upon such a note at its date, and it is entirely clear that the statute does not commence running until it is due. Something is said in some of the cases about a presumption of a demand having been made, arising from the lapse of time or of a proper period for the computation of interest, but no period is intimated, and any rule founded upon such presumption would be too vague for application to business transactions. Such rule should be definite and certain when possible.

To attain this result as to the admissibility of a defense of the maker against the payee or other holder against a transferee, it must be held, either that the note is matured after the lapse of sufficient time to enable the holder to make a demand by the exercise of due diligence, and the defense therefore admissible, or that when payable with interest, not mature until a demand has in fact been made. Either rule will be found certain in its application. But for some authorities to the contrary, I would prefer a rule holding in accordance with the analogies arising from the commencement of the running of the statute of limitations, and of the right immediately to commence a suit, that the note was due when given, and the defense admissible without regard to the time of the transfer by the payee. In the present case the result is the same, whether the first or third specified is the correct rule. The order of the general term can be sustained only upon the second. I am aware that either the first or third will practically destroy the negotiability of this class of paper;

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but such has been the practical effect of all the cases in this state except for a very brief period, except *Merritt v. Todd*, and this case is only applicable to questions of laches in charging indorsers. The other questions presented by the respondent's counsel in his brief, were not raised or passed upon at the trial; they cannot, therefore, be considered here. My conclusion is, that upon both principle and authority the defense was admissible against the plaintiff. The order of the general term granting a new trial should, therefore, be reversed, and judgment given for the defendant on the verdict, with costs of the appeal to this court.

LOTT and SUTHERLAND, JJ., dissented.

Order of general term reversed and judgment for defendant.

THE PEOPLE, plaintiffs in error, v. SCHRYVER.

(42 N. Y. 1.)

Criminal law — justifiable homicide — burden of proof.

In every case of homicide the people must prove the *corpus delicti* beyond a reasonable doubt, and if the prisoner claims a justification he must take upon himself the burden of satisfying the jury by a *preponderance of evidence*.

But where the evidence introduced by the people tends to show that the homicide was justifiable, the prisoner may avail himself of that evidence, and has a right, without introducing affirmative proof, to have the question of justification submitted to the jury.

On the trial of an indictment for manslaughter, the court charged the jury that it was for the prisoner to satisfy the jury, "beyond a reasonable doubt," that the homicide was justifiable. *Held*, to be error.

ERROR to the general term of the supreme court to review the judgment of that court reversing the conviction of the defendant for manslaughter in the third degree.

The defendant in error was indicted and tried for manslaughter in the third degree, for killing one Kavanagh. On the trial the evidence on the part of people showed an affray between the deceased and the prisoner, commenced by an unjustifiable and violent assault of the deceased upon the prisoner, in or during which affray the

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prisoner stabbed the deceased with a knife and killed him. These facts were not disputed, but the dispute was as to whether, when the defendant used the knife, he had reason to believe and did believe that the deceased intended to kill him or to do him great bodily injury. The evidence of the prisoner tended to prove the affirmative of this question. The court charged the jury, among other things, as follows:

"In all criminal cases there are two fundamental rules to be borne in mind by the jury; the one is, that the prisoner is to be presumed innocent until proved guilty; the other is, that the prisoner is entitled to the benefit of any reasonable doubt. But in this case this last rule is only to be applied by you, subject to the conditions and modifications that I shall lay down to you. The killing in this case has been proved, and is conceded, and there is no doubt as to the identity of the prisoner.

"With these conceded facts, the prisoner asserts that the killing was in self-defense, and was justified by the law. It is for him to make this allegation good by proof. If the defendant has given no proof tending to show that the act was committed in self-defense, the necessary self-defense of his person, there is no question before you on this point. If he has given evidence, or if any of the evidence in the case tends to show such a defense, then the question before you is, whether such evidence is satisfactory and sufficient."

"It is for the prisoner to satisfy the jury beyond a reasonable doubt that he did apprehend, and had reason to apprehend, that he was in imminent danger of his life, or of the infliction of some great personal injury. If the evidence falls short of this, and only raises a doubt whether or not the prisoner stood in fear of his life or his person, that is not sufficient to acquit the prisoner. The evidence must go one step further and satisfy this jury beyond reasonable doubt on this point."

To each and every of which propositions the defendant then and there duly excepted.

The jury returned a verdict of guilty, and the prisoner was sentenced to imprisonment for a term of three years. This conviction was reversed by the supreme court at general term and a new trial granted. The people then brought the case by writ of error to this court.

Frederick L. Westbrook, for plaintiff in error.

Wm. Lounsbury, for defendant in error.

EARL, C. J. On the trial the people endeavored to show that the killing was manslaughter in the third degree; and the prisoner, that the killing was in self-defense, and thus justifiable homicide. The court charged the jury that the prisoner was bound to prove his defense of justifiable homicide "beyond a reasonable doubt." In this I think the court erred.

The statute defining manslaughter in the third degree is as follows: "The killing of another in the heat of passion, without a design to effect death, by a dangerous weapon in any case, except such wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed manslaughter in the third degree." 3 R. S., 5th ed. 940, § 12.

Homicide by any person is declared by the statute (*id.* p. 939 § 3) to be justifiable in the following cases:

1. "When resisting any attempt to murder such person, or to commit any felony upon him, etc.; or,
2. "When committed in the lawful defense of such person, etc., when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished."

Then it is provided by section 5, on page 940, that "whenever it shall appear to the jury on the trial of any person indicted for murder or manslaughter, that the alleged homicide was committed under circumstances or in cases, where by law such homicide was justifiable or excusable, the jury shall render a general verdict of not guilty."

Now, what is the rule of the evidence as to the burden of proof, not in a case where the prisoner is attempting to show that the homicide is manslaughter instead of murder, but in a case where he is attempting to show that an admitted homicide was justifiable under the statute? In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. But in criminal cases, because of the more serious and irreparable nature of the consequences of a wrong decision, the jurors are required to be satisfied beyond any reasonable doubt of the guilt of the accused,

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or it is their duty to acquit him, the charge not being proved by that higher degree of evidence which the law demands. In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other hypothesis but that of the guilt of the party. 1 Greenleaf's Ev. § 13, *a*; 3 *id.* § 28; *People v. McCann*, 16 N. Y. 58. Reasonable doubt is defined by Chief Justice SHAW, in *Com. v. Webster*, 5 Cush. 320, to be "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." This degree of certainty is never required in civil cases, but is required in criminal cases, by reason of the humane regard which the law has for the life and liberty of persons put upon trial for crimes.

It is a rule, applicable to criminal as well as to civil trials, that the party having the affirmative of any proposition has the burden of proof, and the people must in all cases sustain this burden beyond a reasonable doubt. But this does not mean that they must thus establish every fact involved in the trial. They must thus establish all the material allegations contained in the indictment. They must thus prove the crime, the *corpus delicti*. In all cases of voluntary, intentional homicide, it is sufficient for the people to prove, beyond a reasonable doubt, that the prisoner killed the person whose life is alleged to have been taken, and then the burden is upon the prisoner to show that it was justifiable or excusable, if he claims that it was either. In Foster's Crown Law, 255, it is said: "In every charge of murder *the fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the act to have been founded in malice, until the contrary appeareth, and very right it is that the law should so presume. The defendant, in this instance, standeth upon just the same ground that every other defendant doth; the matters tending to justify, excuse or alleviate, must appear in evidence *before he can avail himself of them.*" In *Legg's Case*, Kel. 27, John Legg was indicted for the murder of Robert Wise; and "it was upon the evidence agreed, that if one kill another and no sudden quarrel appeareth, this is murder, and it lieth on the party indicted to prove the sudden quarrel." This was approved in the leading case of the

King v. Omeby, 2 Ld. Raym. 1485, in which one objection to the verdict was that the homicide was upon a sudden quarrel, and so but manslaughter, whereupon the court stated the rule thus: "In answer to this objection, I must first take notice, that when a man is killed, the law will not presume that it was upon a sudden quarrel, unless it is proved to be; and therefore in *Legg's Case* it was agreed upon evidence, that if A kill B, and no sudden quarrel appears, it is murder; for it lies upon the party indicted to prove the sudden quarrel." In 1 Hawk., c. 31, § 32, it is laid down that whenever it appears that a man kill another, it shall be intended *prima facie* that he did it maliciously, unless he can make out the contrary by showing that he did it on a sudden provocation, etc.

In 4 Bl. Com. 201, it is said: "We may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless when justified, excused or alleviated into manslaughter; and all these circumstances of justification, excuse or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury." In *Best's Right to Begin and Reply*, page 19, it is said: "Although the law never presumes guilt or fraud in the first instance, yet it is held, that where a homicide has once been proven, the law will presume that it was done maliciously, and cast on the party accused the onus of proving either his complete justification or excuse, or such palliating circumstances as may reduce the offense to manslaughter." To the same effect, see 1 Allison's Cr. Law, 49; 1 Russell on Crimes (1st ed.), 614-616; 1 Greenleaf, § 34; 1 Wharton's Cr. Law, §§ 614, 708, 709; Wharton's Law of Homicide, 458; *People v. Stonecifer*, 6 Cal. 405; *People v. Cotteral*, 18 Johns. 115; *People v. McLeod*, 1 Hill, 377, 436; *Com. v. York*, 9 Metcalf, 93.

In *York's Case*, Chief Justice SHAW has discussed the question with a great wealth of learning and thoroughness of research, and he says: "Suppose a party indicted for manslaughter, and that the defense should be excusable self-defense. Suppose the fact of killing should be clearly proved, but an attempt to prove a previous violent attack upon him by the deceased should fail, although the evidence might tend to raise some doubt whether there was not such previous attack. The conviction in such case must rest on proof establishing the *corpus delicti* beyond reasonable doubt, although the whole evidence would raise a doubt, whether there had not been such previous attack. The proof establishing the necessity for such

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taking of life in self-defense must be satisfactorily made out. Raising a doubt would be insufficient."

In the case of the *People v. McCann*, 16 N. Y. 58, the presiding justice at the trial charged the jury that the prisoner was bound to prove his defense of insanity "beyond a reasonable doubt." Whether this charge was correct or not, was the only question for the consideration of the court of appeals, and it was held to be incorrect, and the judgment was reversed. Two opinions were written; Judge BOWEN held that it was enough for the prisoner to establish this defense, as insanity would be proved in a civil case, by a preponderance of evidence. Judge BROWN held, that while the law presumed every man to be sane, when the prisoner introduced evidence tending to show his insanity, the burden devolved upon the people to prove his sanity, like any other material fact in the case, beyond a reasonable doubt. It does not appear that the court concurred in this view. It was sufficient for the court to hold that the charge was too unfavorable to the prisoner. Before Judge BROWN's opinion shall be taken as the settled law, the question will need further consideration, as it does not seem to be supported by the current of authorities.

The judge presiding at the trial of this case is said to have followed in his charge the case of *Patterson v. The People*, 46 Barb. 325, in which, in a case of homicide, it was held in substance that the prisoner was bound to prove his justification beyond a reasonable doubt. No authority is cited to uphold this rule, and it is clearly against every authority that can be found in the books.

The rule that the *corpus delicti* must be proved beyond a reasonable doubt was intended as a shield to prisoners, and must never be used as a sword. In the language of Lord Hale, *tutius semper est errare in acquittando, quam in puniendo, ex parte misericordiae, quam ex parte justitiæ*.

The people in every case of homicide must prove the *corpus delicti* beyond a reasonable doubt, and if the prisoner claims a justification he must take upon himself the burden of satisfying the jury by a preponderance of evidence. He must produce the same degree of proof that would be required if the blow inflicted had not produced death, and he had been sued for assault and battery, and had set up a justification. When a man takes human life, upon which the law sets a high value, it is not sufficient for him to raise a reasonable doubt whether he was justifiable or not, but he must go

one step further, and give satisfactory evidence that he was justified. This rule is sufficiently humane to the prisoner, and at the same time gives some protection to human life.

If the conclusion which I have thus reached were not sufficiently clear upon reason and authority, I might rest it upon the wording of the statute as above cited. The statute, after defining murder, manslaughter, and justifiable and excusable homicide, provides, in section 5, that whenever "it shall appear to the jury" that the homicide was justifiable or excusable, the jury shall render a verdict of not guilty. Here is the rule just as I claim it to be. The prisoner must make it *appear to the jury* that he was justified. It is not sufficient for him to raise a reasonable doubt, neither is it necessary for him to establish his justification beyond a reasonable doubt. He must make his defense appear to the jury; availing himself of all the evidence in the case given on either side. Nothing more and nothing less is required.

The judgment should therefore be affirmed.

SUTHERLAND, J. The case made by the testimony of the witnesses on the part of the people in this case, was the case of an affray between the deceased and the prisoner, commenced by a most unjustifiable and violent assault of the deceased upon the prisoner, in or during which affray the prisoner stabbed the deceased with a knife, and killed him.

I think, on the case made by the testimony of the witnesses for the people alone, the prisoner, without being sworn and testifying himself, and without calling a witness, had the right to have the question, whether the homicide was, under the circumstances, justifiable, submitted to the jury in a proper way.

The case made by the evidence on the part of the people relieved the prisoner from the burden of showing, on his part, that the fatal wound was given during or in an affray, and under circumstances which gave him the right to have the question as to the justifiableness of the homicide submitted to the jury.

It is not necessary, therefore, in this case, to determine whether the charge of the court to the jury would have been right, had the burden been on the prisoner to show that the homicide was committed in an affray, and under circumstances which gave him the right to have the question of justifiableness submitted to the jury.

It is clear, taking the case made by the evidence on the part of

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the people, that the following part of the charge, to wit: "The killing in this case, has been proved, and is conceded, and there is no doubt as to the identity of the prisoner. With these conceded facts the prisoner asserts that the killing was in self-defense, and justified by the law. *It is for him to make this allegation good by proof.* If the defendant has given no proof, tending to show that the act was committed in self-defense, the necessary self-defense of his person, there is no question before you on this point," etc., was erroneous, and was likely to have, and probably did have, a very unjust and improper influence with the jury, and in producing their verdict.

The charge tended to deprive the prisoner of the benefit of the circumstances under which the homicide was committed, as shown even by the testimony on the part of the people.

The judgment of the general term of the supreme court, reversing the judgment of the court of sessions, should be affirmed.

Judgment affirmed.

McNAUGHT V. McCLAUGHRY, exr., appellant.

(43 N. Y. 22.)

Promissory note — suretyship.

A. executed and delivered to plaintiff his promissory note, in which no time of payment was specified, at the same time agreeing to procure M. to sign the note as surety, if at any time the plaintiff should desire it. The plaintiff accepted the note upon this agreement. A few months after, the plaintiff desired the additional security, and A. procured M. to sign the note, and returned it to plaintiff. No new consideration then passed between any of the parties. *Held*, LOTT and SUTHERLAND, JJ., *dissentiente*, that M. was liable as surety on the note.

APPEAL from judgment of supreme court, general term, affirming judgment of referee.

The action was on a promissory note made by one Abram McClaughry, and signed as surety by the defendant's testator. The facts sufficiently appear in the opinion.

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Amasa J. Parker, for appellant, cited *Mecorney v. Stanley*, 8 Cush. 85; *Union Bank v. Willis*, 8 Met. 504; *Benthall v. Judkins*, 13 id. 265; *McCaughy v. Smith*, 27 N. Y. 41; *Hawkes v. Phillips*, 7 Gray, 284; *Moies v. Bird*, 11 Mass. 436; *Shear v. Mallory*, 13 Johns. 496; *Farley v. Cleveland*, 4 Cow. 432; id. 13; *Elwood v. Monk*, 5 Wend. 235; *Farnsworth v. Clark*, 44 Barb. 601; 1 Wait Pr. 107.

William Gleason, for respondent.

HUNT, J. The case presents but a single question. Abram McClaughry borrows money, or makes a purchase, of the plaintiff, for which he gives him his note for \$300, with interest. No time of payment is specified. At the time of making and delivering the note, Abram promised and agreed with the plaintiff, that he would procure his father to sign the note as surety, if at any time the plaintiff should desire it, or should deem himself insecure. The plaintiff accepted the note upon this agreement. In a few months the plaintiff desired the additional security, and Abram procured his father to sign the note for the accommodation of him, Abram, and redelivered it to the plaintiff. No new consideration then passed between the parties or to the father.

I cannot doubt that the defendant is liable in this action. Both principle and authority concur in this result. The note was past due when the holder became dissatisfied with his security. He informs the maker that he is not satisfied. Two courses were open to the latter, to pay the note or to give the holder additional security. He adopts the last alternative. He procures his father to put his name upon the note, and, in the language of the judge, "redelivered" to the plaintiff the note thus signed. I am not able to see why this is not a new agreement upon a present and valid consideration, and obligatory upon all parties.

The case was argued, however, chiefly upon the second ground, to wit: That at the time of obtaining the money or property, and as a portion of the bargain by which the plaintiff accepted a note, the maker agreed to obtain the name of his father upon the same, whenever desired by the plaintiff, and that the signature was given in performance of that agreement. This position is sound also. Suretyship upon promissory notes may be made in various forms, as by becoming an undersigner, an indorser, or formal guarantor. In

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every form the existence of a sufficient consideration between the maker and the lender establishes a sufficient consideration, also, as against the surety. In practice there is usually no communication between the lender and the surety. The business is transacted between the principals alone. A borrower applies at a bank for a loan, offering to furnish the name of his friend as security, or presents, in the first instance, a note so indorsed. It is neither customary nor necessary for the bank to investigate the relations existing between, or the motives operating upon, the different parties. It is enough that it is the fact that the one is willing to become the surety for the other. In inquiring into the consideration, we inquire, therefore, only so far as to ascertain that a sufficient consideration exists between the principals in the transaction.

How is it in the case before us. The authorities are clear upon the two propositions involved in the question. 1. If Abram had given his note to the plaintiff, and the same had been accepted in performance of the contract without further condition, and the note was yet unmatured, the obtaining an additional indorser would have been a gratuitous act on the part of Abram, and the indorser would not be bound. He would not be bound, not because there was no direct consideration moving to himself, but because there was no sufficient consideration moving to his principal. On the other hand, if Abram had originally agreed with the lender that he would obtain the new indorser, and had obtained the money upon the faith of that promise, then his finding the additional indorser was based upon a valid consideration, and the indorser was held by his signature. To this precise point is the case of *Moies v. Bird*, 11 Mass. 436. This case has been recognized and affirmed in *Hawkes v. Phillips*, 7 Gray, 284; *Lovering v. Fogg*, 18 Pick. 540; *Leonard v. Wildes*, 36 Me. 265. See, also, *Parks v. Brinckerhoff*, 2 Hill, 663; *Clark v. Rawson*, 2 Denio, 135.

I see no objection to the admissibility of the testimony complained of.

Judgment should be affirmed with costs.

LOTT and SUTHERLAND, JJ., dissented.

Judgment affirmed.

ROBINSON V. INTERNATIONAL LIFE ASSURANCE SOCIETY OF LONDON, appellant.

(43 N. Y. 54.)

Principal and agent—effect of war on authority of agent of foreign principal—payment in confederate money.

M., a resident of Virginia, held a policy of life insurance issued by the defendant, a foreign corporation, having a general agency and a sub-board of directors in New York, and paid his premiums regularly to an agent in Richmond, appointed by the New York agency. After the commencement of the war, arising from the rebellion of the southern states, the agent in Richmond received the premiums in confederate money, but made no return to the general agents in New York. Prior to the death of M. the defendants took no steps to revoke the authority of the Richmond agent. *Held*, in an action on the policy, that the defendant being a foreign corporation, the war did not operate as a suspension of the authority of their agent in Richmond. *Held*, also, that the receipt by the agent of confederate money, in payment of the premiums, constituted a valid payment, and was binding on the company.

APPEAL from a judgment of the supreme court at general term, affirming a judgment entered on the report of a referee.

The action was brought upon a policy of insurance, issued by the defendant upon the life of C. W. Macmurdo. The plaintiff was the assignee of the administrator of Macmurdo.

The defendant was an English corporation, duly incorporated under an act of parliament, in the year 1837, as "The National Loan Fund Life Assurance Society," (a title afterward duly changed to its present form) for the purpose of making insurance upon the lives of individuals. In pursuance of this purpose a general agency was established in the city of New York, of which C. G. Habricht and J. G. Holbrooke were the chief managers, assisted by a local board of directors, all holding their position at the pleasure of the English board.

The policy in question was issued in 1845, and it was admitted by the defendant that the renewal premiums had been promptly paid up, to and including that due of the 8th of June, 1861, to the agent of the company at Richmond, Va., one Cowardin being such agent, after 1858. The usual custom of the agent, prior to 1861, had been to give, as voucher for the premium paid, a renewal receipt signed

by the general agents in New York, and to credit the defendant with the amount received, and to pay by draft on New York. The payment made by Macmurdo, on the 8th of June, 1861, was after the actual outbreak of the rebellion, and was certified for by a receipt signed by Cowardin, and not by the general agents.

After June, 1861, Macmurdo continued to pay his premiums regularly to Cowardin, and paid them in confederate money, that being the money in general circulation in the south at the time. Cowardin received that money without objection, and gave receipts signed by himself as agent for the company.

On the 26th of June, 1861, Cowardin wrote to the general agents in New York, inclosing an account of his agency, and stating the payment of renewal premiums by Macmurdo and others. This letter was received by the general agents July 7th, 1861, after the commencement of open hostilities, and after they were aware of the issue of confederate money by that government. The renewal premiums of Cowardin were, however, entered in the books as duly paid. It also appeared that in the latter part of July, 1861, one of the general agents instructed Cowardin to receive the premiums and hold them subject to his order.

In October, 1862, Macmurdo died, and in February following, Cowardin wrote to the directors of the company, in London, stating the circumstances of his death, and advising prompt payment, and also giving an account of his agency and of the amount of confederate money in his hands. This letter reached the company in April or May, 1863, but no intimation was given that Cowardin's acts were not recognized by the company until sometime in 1865. Prior to this time (1865), there was no revocation of Cowardin's authority by any act of the defendant. In 1866, the general agents directed the insertion of an advertisement in the Richmond newspapers, announcing that the company "have no business agent at present in Richmond."

The jury found a verdict for the plaintiff, and judgment was entered thereupon.

James W. Gerard, Jr., for the appellant, to the point that the defendant had a domicile here, cited *The Portland*, 3 Chr. Rob. 42; *The Jonge Klassina*, 5 Chr. Rob. 302; *The Ann*, 1 Dodson, 231; *The Antonio Joanna*, 1 Wheat., 159; *Elbers v. United Ins. Co.* 16 Johns. 128; *Phillips on Ins.*, 112, § 164; *The Society, etc., v. Wheeler*,

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2 Gall. 105, 131; *The People v. Cent. R. R. of N. J.*, 48 Barb. 478; 1 Duer on Ins. 525, 527. The defendant being thus domiciled here, and its *status* that of an enemy, as to the inhabitants of the hostile confederacy, it was illegal to conduct any transactions with the public enemy. 2 Law. Wheaton, 559, 569, part iv., chap. 1; *McConnell v. Hector*, 1 Bos. & Pull. 113; 1 Duer on Ins. 495; *The Harmony*, 2 Chr. Rob. 322; 1 Kent, 85-88 (10th ed.); *The Indian Chief*, 3 Chr. Rob. 12, 22; *The Citto*, 3 id. 38; *The Venus*, 8 Cranch, 253; *Livingston v. Maryland Ins. Co.* 7 id. 542; *The Frances*, 8 id. 363; *Beebe v. Johnson*, 19 Wend. 500; *The President*, 5 Chr. Rob. 277; *The Venice*, 2 Wall. 275; *The Freundschaft*, 4 Wheat. 105; *The Rendsborg*, 4 Chr. Rob. 140; *The Vigilantia*, 1 id. 15; *The San Jose*, 2 Gall. 268. The open state of war was notice of revocation of the agency. *Carver v. Lane*, 1 E. D. Smith, 165; Lawrence's Wheaton, 557, note; Stor. on Agency, 593, §§ 481, 484. All contracts became suspended, and the derivative powers of agents ceased. *The Julia*, 8 Cranch, 181; *The Rapid*, id. 161; *Griswold v. Waddington*, 15 Johns. 57; 16 id. 438; *The William Bagaly*, 5 Wall. 407; *Honger v. Abbot*, 6 Wall. 534; *Jecker v. Montgomery*, 18 How. 110; *Esposito v. Bowden*, 7 Ell. & Bl. 788; *a fortiori* as to contracts of insurance; 1 Duer on Ins. 417; 3 Kent, 255; 1 Phillips on Ins. (3d ed.) 104, § 149; *Furtado v. Rogers*, 3 Bos. & Pul. 191; *Kellner v. LaMesurier*, 4 East, 396; *Gamba v. LaMesurier*, id. 407; *Brandon v. Curling*, id. 410. Even if defendant had no domicile here, the contract was illegal. *Bank of Augusta v. Earle*, 13 Peters, 519; *Baird v. Poole*, 12 N. Y. 495; *New Hope Co. v. Penn. Silk Co.*, 25 Wend. 648; *Kennett v. Chambers*, 14 How. 39; *Honger v. Abbot*, 6 Wall. 534. The agent had no authority to receive any thing but "money." *Wilson v. Genesee Ins. Co.*, 14 N. Y. 418; *Matthews v. Hamilton*, 23 Ill. 470; *Todd v. Reid*, 4 Barn. & Ald. 210; *Russell v. Bagley*, id. 395; Dunlap's Agency, 280, 281; *Partridge v. Bank of England*, 58 E. Com. Law. 9 Adol. & El. (N. S.) 396; *Grant v. Norway*, 73 C. B. 665; *Ontario Bank v. Lightbody*, 13 Wend. 101. Confederate notes were not money. *Clark v. Metropolitan Bank*, 3 Duer, 241; Const. of U. S., art. 1, § 10; *Wright v. Overall*, 2 Coldwell (Tenn.) 345; *Craig v. The State of Missouri*, 4 Peters, 410; *Briscoe v. Bank of Kentucky*, 11 id. 258.

Edmund Randolph Robinson, for respondent.

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HUNT, J. The policy, on which this action is brought, was issued by "The National Loan Fund Life Assurance Society," 26 Cornhill, London. Cowardin was regularly appointed the agent of that society to receive the premiums paid annually or quarterly at Richmond, Va., by persons to whom policies were issued. He was thus appointed by the New York board in 1858, and continued to act as such agent until the year 1865. There was no actual revocation of his powers until the spring of that year.

The defendant is an incorporation, organized under the authority of the British parliament, for the purpose of making insurance upon the lives of individuals. To carry on this business in the United States, it established an agency in the city of New York, of which Mr. Holbrooke and Mr. Habricht were the chief managers. They were assisted by certain other persons, residents of the city of New York, and together formed a board of directors, exercising substantially all the powers of the company in this locality. They issued policies and paid losses and appointed agents upon their own motion. They exercised all the powers that agents could well exercise, and, it may be assumed, without control or interference by the directors in England. They were general agents intrusted with unlimited authority. It is important to observe that the New York board were but agents, however general their character or unlimited their authority. The principal was the company itself, in England. That principal could at any moment have revoked the powers of these New York agents, so far as the agents themselves were concerned, and assumed all its original authority.

Macmurdo obtained his policy of life insurance in the year 1845. He paid his premiums quarterly to the agent of the company in Richmond; Cowardin being such agent after 1858, appointed by the New York board. The premium thus paid to Cowardin in June, 1861, is admitted by the company. Its validity is not questioned, either on account of the existence, at that time, of a state of war, arising from the rebellion, or on account of the currency in which the payment was made.

The first objection of the defendant is this: that the existence of the war after June, 1861, arising from the rebellion of the southern states, revoked, or suspended during the war, the agency of Cowardin, and that his action during that period was null and void. That war then existed in this country cannot be doubted. "When portions of the citizens of a civil government have rebelled, have

established another government, resorted to arms to maintain it, and the rebellion is of such magnitude that the military and naval forces of the government have been called out to suppress it, they are to be regarded as belligerents. To create belligerent rights, it is not necessary that there should be war between separate and independent powers. They may exist between the parties to a civil war. * * * A civil war exists whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts cannot be kept open." *Swinton v. Col. Ins. Co.*, 37 N. Y. 178; "*Prize Cases*," 2 Black, 667, 668.

It is far from certain, that, if the residence of the defendant had been in the city of New York, the existence of war would have vacated or suspended the authority of Cowardin. A power of attorney to collect a debt, or to receive money, seems to continue valid, although the principal resides in an enemy's country. *Clark v. Morey*, 10 Johns. 73; *Griswold v. Waddington*, 15 id. 64, 68; *Buchanan v. Curry*, 19 id. 137; *Conn. v. Penn.*, 1 Pet. 496; *Dennistoun v. Imbrie*, 3 Wash. C. C. 396. It is not necessary to pass upon this point, as the principal in this contract was in no sense a resident of the state or city of New York. The defendant was a British incorporation, organized by virtue of an act of parliament, carrying on its business in London, as its home office, and doing business also in this state, strictly and professedly as a foreign corporation. Whether its business here is transacted by one agent or many, and whether such agent has extended or restricted authority, can have no effect upon the domicile of the company. Residence and agency have no connection with each other.

If it is conceded, that a contract of insurance, by a citizen of this state, upon the life of a citizen of Virginia, in the year 1862, would have been avoided or suspended on the ground that the condition of war will not permit such contracts between the citizens of states at war with each other, we do not then reach the case before us. This was a contract between a citizen of a neutral country and a citizen of a belligerent country. No authority is adduced to sustain the proposition that this state of things annuls or suspends a power of attorney to receive premiums on a policy of insurance. It is supposed that no such authority can be cited, but that the law is to the contrary. *Ludlow v. Bowne*, 1 Johns. 1; *De Wolf v. Firemen's Ins. Co.*, 20 id. 214; affirmed, 2 Cow. 56.

The argument of the appellant's counsel throughout is based upon

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the idea that the *status* of the insured and of the defendants, in a legal and actual sense, was that of enemies. He argues thence that all commercial and other intercourse and business transactions became illegal and void, and that the powers of all agents to make or continue such contracts ceased. The fact assumed does not exist in the present case. The *status* of the defendant was simply that of a neutral, contracting or continuing a contract with a citizen of a belligerent country. Such contracts are valid by the laws of all countries, and goods to be delivered under such contracts are exempt from seizure by hostile cruisers, except when they are articles contraband of war. Authorities, *supra*.

The question of authority must also be considered as disposed of, by two other considerations. 1. The jury found that the general agents in New York had given express authority, in July, 1861, to Cowardin, to continue to receive premiums, and to hold the same subject to the order of the New York agents. Willis testified that Mr. Holbrooke gave such directions to him, to be so communicated to Cowardin, and that he did so communicate. Cowardin testifies that he received and acted upon such authority. Holbrooke scarcely denies it; but the judge submitted the question to the jury, who found in favor of the authority. 2. In February, 1863, Cowardin informed the company in London of all his transactions, including the Macmurdo case. The company made no objections to any of his transactions, or to his mode of doing business.

Under such circumstances, the authority of Cowardin to receive payment for the company, and its binding obligation upon them, are scarcely open to argument.

The appellant's counsel further insists, that Cowardin had no authority to receive payment of the premiums in "confederate money," and that the payment in that medium was in no legal sense a payment of such premiums.

It appeared, from the evidence, that Cowardin had, from the outset of his agency, received payment of all the premiums, paid by fifty or sixty different persons, in the currency of the country; that, as received, he deposited the same to his own credit in the bank, and at stated periods, after deducting his commissions, remitted the balance to the directors in New York by a draft payable there. He continued this practice in 1861 and 1862, as to the manner of receiving payments. The communications between New York and Richmond, for all business purposes, were entirely cut off; no

remittances could therefore be made at that time. It appeared that the confederate currency began to be issued in July, August, and September, 1861. At the date last named, it was equal in value to the circulating bank notes of Virginia, and about five per cent below gold, and it soon became the almost exclusive circulating medium of the country. It is contended that this circulation was not money, for the reason that it was issued by a rebel government; that it had no legal validity; that it was no better payment than if counterfeit money had been received by Cowardin. This question must be decided upon the condition of things as they were, and as they appeared, in 1861 and 1862, and not as we find them now, in 1870.

The year 1861 had brought many triumphs to the armies of the rebellion. It had brought defeat to the forces of the government — mortification to its citizens. The disastrous battle of the first Bull Run had occurred in July. The surrender of General Twiggs was in the same month. The defeat at Wilson's Creek and the death of General Lyon had taken place in August. The month of October had witnessed the capture of Mason and Slidell, with the approbation of Congress and of the people. A little time further witnessed their unconditional surrender and return to a British vessel, upon the imperious and uncereemonious demand of the British government. The same month of October was marked by the disastrous defeat of Ball's Bluff. In May, 1862, General Banks was driven from the valley of the Shenandoah. In May and June, the disasters of McClellan before Richmond resulted in his retreat to Harrison's Landing. The second Bull Run, and the invasion of Maryland by General Lee, occurred soon after. Happily, these reverses did not accomplish the overthrow of the government. The subsequent success of the union armies, under Grant, Sherman, Thomas, Sheridan, and others, overthrew the rebellion, and established the government on a firm basis. This was not, however, effected until the spring of 1865; and, so late as the summer of 1863, the armies of the rebellion were able to make a victorious incursion into the state of Pennsylvania.

In addition to this general summary, it is to be remembered that it is proved in this case that, up to September, 1861, this currency was equal in value to the bank notes in circulation in Virginia; that it was but five per cent below gold, and that at a still later period it was but sixteen per cent below gold. Let it be observed, also, that our own circulating currency was so depressed that at

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some periods of the war one hundred in gold would buy two hundred and ninety in currency. In January of the present year, five years after the restoration of peace, the national bank currency in circulation by authority of the United States laws, and the legal tender notes of the United States, were at a discount from the standard of gold of more than twenty per cent. Under such circumstances, it is quite unreasonable to say that Cowardin had no authority to receive the payment, in confederate money, of the premiums due to the company, and that it was no better than counterfeit money. It was a currency issued by the authority of an existing, *de facto* government, which had adopted a constitutional form of government, and was fully organized under it, which had in the field large armies, had won many battles, had invaded the states of the north, had besieged the national capital, was recognized as a belligerent power, soon after, by the British government, and which had, from the outset, been treated as a belligerent by the government of the United States, and which was itself confident of maintaining its existence. It is true that these notes are now valuable only as relics of a past existence. It was, however, nearly four years after the occurrences we are considering before this result became certain, and we cannot transport our knowledge backward, and by its use condemn, as base and worthless, a currency which was then in general use, and might become permanently valuable.

It is not necessary for us to go so far as the supreme court of the United States have gone, in the recent case of *Thorington v. Smith & Hartly*, 8 Wall. 1. The present is the case of an executed contract, in which the parties acted upon the state of things as they existed. They were compelled so to act or not to act at all. The action is past and ended. The rights of the parties were fixed and settled years ago, and we are called upon, by this defense, to unsettle and destroy them. In the case of a debt paid, or property sold and paid for, in confederate money, it would be unreasonable to call upon the courts to rip up the transaction and compel the repayment of the money. The requests to charge, which were refused by the judge, were based upon the theories which I have discussed, and if I am right in my views, the refusals were properly made.

Judgment should be affirmed.

Judgment affirmed.

RUSSELL and ano. v. CARRINGTON and ano., appellants.

(43 N. Y. 118.)

Sale and delivery — when title passes without separation.

The plaintiffs purchased of defendants a quantity of corn, parcel of a specified cargo, then stored in a warehouse, paid the price therefor, and received a receipted bill of sale. The defendants thereupon drew an order upon the superintendent of the warehouse, for delivery to plaintiffs of the quantity of corn from the specified cargo, and the superintendent on receipt of the order gave defendants his order for the delivery of said corn to plaintiffs, which order was delivered to plaintiffs. A few hours after, and before the presentation of said order, the warehouse was destroyed by fire, and with it the grain. *Held*, in an action to recover back the price paid, that the sale and delivery were consummated, and the loss, therefore, on the plaintiffs.

Upon a sale of a specified quantity of grain, its separation from a mass, undistinguishable in quality or value in which it is included is not necessary to pass the title when the intention to do so is otherwise clearly manifested.

APPEAL from the judgment of the supreme court at general term, affirming a judgment for the plaintiff.

The action was brought to recover back the price paid for a quantity of corn. The facts are stated in the opinion.

Edwin Allen, for the appellants, cited *Para. Mer. L.* 41, 42; *Riddle v. Varnum*, 20 Pick. 280; *Lee v. Kilbourn*, 3 Gray, 598; *Williams on Pers. Prop.* 37, note 1; *Olyphant v. Baker*, 5 Den. 379; *Brade v. Brooks*, 22 Me. 470; 2 Kent, 493; *Davis v. Moore*, 13 Me. 427; *Whitehouse v. Frost*, 12 East, 614; *Pleasants v. Pendleton*, 6 Rand. 47; *Jackson v. Anderson*, 4 Taunt. 24; *Dawson v. Osborn*, 1 Pick. 477; *Bradley v. Wheeler*, 4 Rob. 18; *Waldron v. Romaine*, 22 N. Y. 368; *Kimberly v. Patchin*, 19 id. 330; *Elmore v. Stone*, 1 Taunt. 458; *Stanton v. Small*, 3 Sand. S. C. 240; *Leonard v. Davis*, 1 Black (U. S.) 482; *Cushman v. Holyoke*, 34 Me. 292; *Cunningham v. Asterbrooks*, 20 id. 553; *Cole v. Transportation Co.*, 26 Vt. 87; 2 *Para. on Con.* 323; *Chitty on Con.* (9th ed.) 391, n. L.

LOTT, J. The following are the material facts in this case, as found by the judge who tried the issues therein without a jury. The plaintiffs, on the eleventh day of August, 1858, bargained with the defendants for the purchase from them of four hundred bushels of corn,

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parcel of a cargo of corn from the schooner *St. Helena*, which was then stored in a warehouse in Oswego, known as the *Empire elevator*, at a price agreed upon, which was paid to the defendants, and they gave a bill of sale receipted therefor. The defendant Carrington owned two-thirds of the elevator, and the other third was owned by one Smith, and was in charge of Philander Rathbun. The corn was stored there for account of Luther Wright, and Rathbun was authorized to deliver it only upon the orders of Wright. The defendants, immediately after giving the receipt, drew an order upon Wright (calling him superintendent), and delivered it to him for the delivery to the plaintiffs of "four hundred bushels of corn from cargo schooner *St. Helena*, account of same" (but of which order the plaintiffs had no knowledge till the trial of the action), and, upon such delivery thereof, Wright gave the defendants an order in the following terms:

"GENERAL SUPERINTENDENT'S OFFICE, }
Oswego, August 11, 1858. }

"*To Empire Elevator:*

"Deliver to R. & McCarthy four hundred bushels of corn, from cargo of *St. Helena*, taking a receipt for the same.

"400 bushels.

L. WRIGHT, *Superintendent.*"

This order was delivered by the defendants to the plaintiffs, who left it with their agents, with instructions to deliver it to the master of the schooner *Northerner* on her arrival at Oswego.

When the said bargain was made, the plaintiffs informed the defendants that they wanted the corn to make out a cargo of two thousand bushels, and that they wished it to ship by the said schooner, which would arrive at Oswego in about two days from that time, but she did, in fact, arrive on the next day, at between 10 and 12 o'clock in the afternoon.

On the following morning, and before the presentation of the order given by Wright, the elevator was consumed by fire, and its contents, including the corn in question, were destroyed or greatly damaged, without fault or negligence of the defendants. The four hundred bushels of corn were in no way separated from the rest of the cargo of the *St. Helena*, and remained in the elevator until its destruction by fire, as above stated.

The master of the *Northerner* subsequently presented the order of Wright to the defendants, and demanded the four hundred bushels of corn on behalf of the plaintiffs; but the defendants refused to deliver that corn, or any other corn, to the plaintiffs, by telling them

they "must call on the association; that the defendants had nothing to do with the corn, and that the corn had been damaged and destroyed;" but they "did not in any way refuse to deliver the corn."

The judge, upon these facts, found, as conclusions of law, that the sale of the corn was not consummated; that the contract for the sale remained executory; and, the defendants having failed to deliver the corn, the plaintiffs were entitled to recover the price paid therefor, with interest from the time of such payment, and ordered judgment therefor.

At the close of the testimony, the defendants requested the judge to find that the sale of the corn in question was complete and perfect upon the receipt by the plaintiffs of Wright's order and the bill of sale and the payment of the purchase-money, and also that the giving of the said order by the defendants on Wright, and the acceptance from them by the plaintiffs of his order on the elevator, was, in law, a delivery of the said corn to the plaintiffs. Each of those requests was refused, and proper exceptions to such refusal, and also to the several conclusions of law by the judge, were properly taken.

The material question arising thereon is, whether the title to the corn in question had passed to, and become vested in, the plaintiffs, at the time of the fire.

It must, in our opinion, be deemed to have been established, by the decision in *Kimberly v. Patchin*, 19 N. Y. 330, as well expressed in the head note thereto, that, "upon a sale of a specified quantity of grain, its separation from a mass, undistinguishable in quality or value, in which it is included, is not necessary to pass the title, when the intention to do so is otherwise clearly manifested."

In that case, the owner of wheat lying in his warehouse sold six thousand bushels thereof for a specified price, and gave to the purchaser a receipt that he had received it in store for him, subject to his order, but it was never separated from the residue thereof, and was never, in fact, delivered to him. The vendor afterward sold the whole to the plaintiffs in the action, and they claimed title under their purchase, and the question involved was, which purchaser had the superior title. Comstock, J., in giving the opinion of the court says, that the first sale was not in bulk, but precisely of the six thousand bushels, and on that ground it was claimed by the plaintiffs that, although the parties intended a transfer of the title to the

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purchaser, the law overruled that intention, although expressed in plain written language, entirely appropriate to that purpose. He then, after an elaborate examination of the question on principle, and conflicting authorities, comes to the conclusion, that, in relation to grain and property of that nature, "when the quantity and general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances;" and that none of the cases go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of a quantity, without an actual separation, where the mass is ascertained by the contract, and all parts of the same value and undistinguishable from each other; and it was held, that the intent to vest the title to the whole in the first purchaser was evinced by the seller's receipt, declaring that the property was held subject to his order, and that he acquired a perfect title thereto.

Upon the application of the principle established in that case to the facts in this, there appears to be no valid ground for questioning the plaintiffs' title to the corn in question. It is true that there was no express declaration given by the defendants that they held it subject to the plaintiffs' order, but the intention to vest them with the title appears to be clear and unquestionable. It is shown that the plaintiffs informed the defendants, at the time of making the bargain for the purchase, that they wanted the corn to make up a cargo of two thousand bushels, to be shipped by the schooner *Northener*, which was expected to arrive in about two days from that time, and what was done was sufficient to enable them to obtain its delivery without any further application to the defendants. The order of Wright was effectual for that purpose. None other would have been available. The corn was stored for his account, and it is expressly found that Rathbun, who had charge of the elevator, was authorized to deliver it only on the order of Wright. When, therefore, that was obtained by the defendants, on their written request to him to make such delivery, they, on giving it to the plaintiffs, lost all control over the corn, and he, from that time, may be considered their bailee; but if he did not hold that relation to them, they were entitled, on the presentation of his order, to the possession of the property, and could have enforced its delivery after a demand and a refusal. These views are entirely consistent with the rule laid down by Mr. Parsons in 1 Parsons on Contract, 3d ed.,

page 441, cited by the defendants' counsel, where he says: "The sale is not completed until the happening of any event expressly provided for, or so long as any thing remains to be done to the thing sold to put it in a condition for sale, or to identify it or discriminate it from other things, or determine its quantity if the price depends on this, unless this is to be done by the buyer alone;" and the court below, in the prevailing opinion, says: "The general rule on the subject is sufficiently expressed in the proposition, that, when any thing is to be done by the vendor in order to ascertain the value, quality or quantity of the goods sold, the delivery is not complete and the property does not pass to the vendee. So long as any thing remains to be done to put the article or commodity sold in a condition for sale, or to discriminate it from other things with which it is intermixed, or to determine the price when that is dependent upon the quantity, the sale is not completed."

The rule referred to, both by Mr. Parsons and the court below, is not applicable where the vendor is not to do the thing required, and it is said in note *t*, to the rule laid down by Mr. Parsons: "It is held that, if the parties intended that the sale should be complete before the article is weighed or measured, the property will pass before this is done." The bill and receipt are evidence of such an intent. A receipt admits that a sale has been had, and it is an acknowledgment of a past sale. This principle was asserted by WRIGHT, J., in *Filkins v. Whyland*, 24 N. Y. 341; and in the absence of a finding that any thing further was to be done by the defendant, the presumption is, that it was a perfect and complete sale.

The above considerations lead us to the conclusion that the sale of the corn was consummated, and that the transaction was not merely an executory contract.

Assuming that to be the true construction of the dealings between the parties, it follows, that the title to the corn had passed to and become the property of the plaintiffs. The fact that there had not been an actual delivery of it is not material. That, Judge COMSTOCK says, in the opinion referred to, at pp. 333, 334, "is not indispensable in any case to pass a title, if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it;" and in *Terry v. Wheeler*, 25 N. Y. 520, it was expressly held that a delivery was not necessary.

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In that case, the vendor of a pile of lumber, which was selected and paid for, agreed to deliver it free of cartage at a railroad station, but before its delivery it was accidentally destroyed by fire, and the assignee of the purchaser sued to recover the purchase-money. It was held, Judge SELDEN giving the opinion, that the title was in the vendee, citing in support of the decision, Chitty on Contracts, 8th Am ed. p. 332, and *Olyphant v. Baker*, 5 Denio, 382, and said: "Where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he agreed to transport it to a given place. I think in such case the property passes at the time of the contract, and that in carrying it the seller acts as bailee, and not as owner."

It follows, from the views above expressed, that the decision of the judge on the trial was erroneous, and that the judgment entered thereon, and of the general term in affirmance thereof, should both be reversed and a new trial ordered, costs to abide the event.

EARL, Ch. J., and HUNT, J., dissented.

Judgment reversed, and new trial granted.

WHITE v. CARROLL, appellant.

(43 N. Y. 161.)

Libel and slander — answers of witness.

It is a question for the jury to determine whether answers given by a person in the course of his testimony as a witness, and claimed to be slanderous, were so given under the belief that they were pertinent and relevant to the question at issue, or from malice.

APPEAL by the defendant from a judgment of the supreme court at general term, ordering a judgment for the plaintiff on a verdict of the jury. The facts are stated in the opinion.

John H. Reynolds, for appellant.

Rufus W. Peckham, Jr., for respondent.

SUTHERLAND, J., after reviewing the statutes relative to the different schools of medicine, and concluding that, since the act of 1844 (Laws 1844, p. 406), it is actionable to falsely and maliciously call either a homœopathic or allopathic physician a quack, proceeded :

On the trial of this action, before Mr. Justice POTTER and a jury at the circuit, it appeared, that, in 1858 and 1859, a proceeding was going on before the surrogate of Montgomery county, in which the contested point or question was the testamentary capacity of one Jay Phillips ; that the plaintiff and the defendant were both at the time, and for some years previously had been, practicing as physicians at Amsterdam, Montgomery county, the plaintiff as a homœopathic physician, and the defendant as an allopathic physician ; that both had been sworn as witnesses, and testified in the proceedings before the surrogate, the defendant some time after the plaintiff ; that on the examination of the defendant as such witness, he was asked whether any other physician was in attendance on Jay Phillips, at the time he was attending him, and that he answered : " Not as I know of." That he was then asked : " Did not any physician attend him, at the time he was at Mrs. Moore's, when you did not ?" That to this question the defendant answered : " Not as I know of ; I understand he had a quack ; I would not call him a physician ; I understood that Dr. White, as he is called, had been there." That this evidence was reduced to writing by the surrogate, and filed in the surrogates' office ; and thereupon this action was brought, the complaint in which contains two counts, one for libel, or for words written ; and the other for slander, or for words spoken.

No point was made on the trial of the action that the words alleged in the complaint had not been proved to have been spoken by the defendant, but a motion was made on his part to dismiss the complaint, substantially upon the ground that the words spoken by the defendant were not actionable, because they were spoken on his examination as a witness, and were spoken as pertinent and responsive to the questions asked him.

Justice POTTER denied the motion to dismiss the complaint, and the defendant excepted.

In submitting to the jury the question, " whether the defendant,

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at the time he so testified and used the words in question, believed the words so used by him were relevant or pertinent to the question then on trial," Justice POTTER charged the jury as follows: "That if the jury believed, from all the circumstances proved, from the questions put to him, and from his manner of answering, and from the answers themselves, that he testified in good faith, or in the belief that his answers were pertinent and relevant, then the law protected him in what he said; it was privileged, and their verdict should be for the defendant. That if, on the contrary, they should believe from this evidence that the defendant, though testifying at the time as a witness, and as such entitled to the protection of the law, in so using the words proved was actuated by malice; that he used the words for the mere purpose of defaming the plaintiff, then the law withdrew the protection it would otherwise have afforded him, and he became amenable to the consequences of uttering the slander, or of publishing the libel."

There is certainly some doubt whether the defendant's exception, which he claims applies to this part of the charge, was sufficiently specific or definite to raise the question as to its correctness; but I shall assume that it was; and I shall also assume, in view of what I have said preliminarily, as the counsel for the defendant assumed on the argument, and assumes in his points, that the only material questions presented by this appeal are those presented by the two exceptions referred to.

Now, as to the first, it is perfectly clear, that the question, whether the defendant was protected under the circumstances, was not a question of law for the court, but was a question of fact for the jury. It was really a question of conduct, of motive, of good faith and honest purpose, or of bad faith and malicious purpose.

The question was, whether the defendant did, or did not, avail himself of the occasion to maliciously answer the questions put to him as a witness, in the way he did. This question was most emphatically a question for the jury; and I think it was submitted to the jury as favorably for the defendant as he had a right to expect or ask.

It is true, that in submitting it to the jury, Justice POTTER assumed that the defendant, when he answered the questions as he did, knew what the question in the proceeding before the surrogate was; but Justice POTTER had a right to assume this under the circumstances. I think the judgment should be affirmed with costs.

Judgment affirmed.

MACK v. PATCHIN, appellant.

(43 N. Y. 167.)

Lessor and lessee — breach of covenant for quiet enjoyment — measure of damage.

A covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land, by whatever form of words the agreement is made. The measure of damage for a breach of covenant for quiet enjoyment is the value of the unexpired term of the lease at the time of the eviction, over and above the rent reserved by the terms of the lease.

APPEAL from a judgment entered on a decision of the Buffalo superior court at general term, ordering judgment upon a verdict for the plaintiff.

The action was for breach of covenant for quiet enjoyment. The plaintiff leased of defendant a warehouse for a term of six years. The defendant was at the time owner of the warehouse, subject to the lien of certain mortgages. These mortgages were subsequently foreclosed, and the demised premises were purchased at the foreclosure sale by the defendant, and one Dorsheimer, jointly. Thereupon the purchasers obtained a writ of assistance for the removal of the plaintiff. Before the execution of the writ, and while the plaintiff was still in possession, he made an arrangement in writing, with the purchasers, by which he was to remain in possession until the May following, paying rent at the rate specified in the lease. On the first of May, the plaintiff went out of possession, having occupied in all about two years. There was no express covenant in the lease for quiet enjoyment. On the trial the court charged the jury that the lease contained an implied covenant for quiet enjoyment, and that it was for them to determine whether there had been an eviction, and also whether the arrangement made between the parties, after the issue of the writ of assistance, was intended by the plaintiff as a surrender of any right or cause of action under the lease; that an actual expulsion by physical force was not necessary to constitute an eviction; and that, in case they found for the plaintiff, the measure of damage was the value of the unexpired term of the lease at the time of the eviction, over and above the rent reserved by the terms of the lease.

The defendant excepted to the charge, and asked the court to

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charge the reverse of the several propositions laid down, which request was refused and exception taken.

The jury rendered a verdict for the plaintiff for \$1,941.67.

The exceptions were heard in the first instance at general term, and judgment was then ordered for plaintiff on the verdict. The defendant, thereupon, appealed to this court.

John Ganson, for appellant.

Sherman S. Rogers, for respondent.

EARL, C. J. The law is too well settled to be doubted or shaken, that a lease like the one under consideration contains an implied covenant for quiet enjoyment. This covenant having been broken in this case, the plaintiff was entitled to recover, and the only serious question is as to the measure of damages.

The measure of damages, in an action against the vendor for breach of a contract for the sale of personal property, is the difference between the contract and the market price. But the same rule has not been applied against the vendor or lessor of real estate. Ordinarily, in an action against the vendor of real estate for breach of covenant of warranty, the vendee can recover only the consideration paid, and interest for not exceeding six years; and when the contract of sale is executory, no deed having been given, in cases where no part of the purchase-money has been paid, the vendee can recover only nominal damages; and in cases where purchase-money has been paid, he can recover the purchase-money, interest and nominal damages. In an action by the lessee against the lessor for breach of covenant for quiet enjoyment, the lessee can ordinarily recover only such rent as he has advanced, and such mesne profits as he is liable to pay over; and in cases where the lessor is sued for a breach of a contract to give a lease or to give possession, ordinarily the lessee can recover only nominal damages and some incidental expenses, but nothing for the value of his lease. These rules, however much they may be criticised, must be regarded as settled in this state. But at an early day, in England and in this country, certain cases were declared to be exceptions to these rules, or, more properly speaking, not to be within them; as, if the vendor is guilty of fraud; or can convey but will not, either from perverseness or to secure a better bargain; or if he has covenanted to convey, when he knew he had no authority to contract to convey; or where it is

in his power to remedy a defect in his title, and he refuses or neglects to do so; or when he refuses to incur expenses which would enable him to fulfill his contract; in all these cases, the vendor or lessor is liable to the vendee or lessee for the loss of the bargain, under rules analogous to those applied in the sale of personal property. *Bush v. Cole*, 28 N. Y. 261; *Trull v. Granger*, 4 Seld. 115; *Driggs v. Dwight*, 17 Wend. 71; *Brinckerhoff v. Phelps*, 24 Barb. 100; *Tracy v. The Albany Exchange Co.*, 3 Seld. 472; *Chatterton v. Fox*, 5 Duer, 64; *Dean v. Roesler*, 1 Hilt. 420; *Grant v. Tallman*, 20 N. Y. 191; *Conger v. Weaver*, 20 id. 140; *Lock v. Furze*, 1 Law Reports Com. Pleas. 441; *Engle v. Fitch*, 3 Law Reports Queen's Bench, 314.

In the last case cited, COCKBURN, Ch. J., says: "The purchaser (of personal property) will be entitled to the difference between the contract and the market price. There is nothing in the nature of real property which, either on technical or general grounds, should take a contract for the sale of real estate out of this general rule, with one single exception, namely, that, owing to the state of the law as to real property, the undoubted owner of an estate often finds, unexpectedly, difficulty in making out a title, which he cannot overcome; if, an obligation to make out title being implied in every such contract, the opposite party rejects the title and repudiates the contract, it seems not altogether unreasonable that he shall be entitled to no more than the return of the deposit, if any, and the expense of investigating the title. In this exceptional case he is put, not in the condition in which he would have been if the contract had been performed, but in the condition in which he would have been if the contract had not been made. He is where he was before, without the estate and the benefits it would have brought him, if a title could have been made to it. But the limit of the exception is to be found in the reason on which it is based. The reason ceasing, the rule should cease." In the same case the learned judge says that the rule "should have no application when the failure either to make out a title or to give possession arises, not from the inability of the vendor, but from his unwillingness either to remedy a defect in the title or to obtain possession, on the score of expenses."

In this case, the defendant resided in Buffalo, where the real estate was located, and he owned the real estate at the time he made the lease; and, in the absence of any proof to the contrary, he must be presumed to have known of the mortgages upon the real estate at

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the time he made the lease. He is, therefore, within the rule of law above alluded to, liable to the damages awarded against him, because he gave the lease, knowing of the defect in his title. Then, too, he should be held liable to these damages, because, being the owner of the equity of redemption, and there being, so far as appears, no obstacle in the way, he did not pay up the mortgages and thus perfect his title and protect the lease he had given. Again, instead of purchasing the real estate at the mortgage sale jointly with Dorsheimer, why did he not, being the owner of the equity of redemption, bid off the real estate alone, and thus protect the lease which he had given, knowing of these incumbrances upon his title? So far as appears, it was not impracticable nor even difficult for him to do so. When he gave this lease, if he acted in *good faith*, he must have intended, in some way, to have taken care of these mortgages; and, because he did not do so, having the ability, so far as appears, to do so, he should be held liable to the damages recovered. He not only failed to do his duty to the plaintiff in any of the respects here indicated, but went actively to work to remove him from the premises, and succeeded in doing so. He can claim no benefit from the fact that he did not do it alone, but that he did it in conjunction with Dorsheimer. It is not certain that Dorsheimer would have purchased without him, or that he would have moved to dispossess the plaintiff without his co-operation and against his wishes. He aided in dispossessing him, not of half the premises only, but of the whole; and hence he must, in this action, be responsible as if he had done it alone. Upon the whole, therefore, I am clearly of the opinion that the judgment should be affirmed.

E. DARWIN SMITH, J. If it was admissible in practice in this court, I should be quite content to affirm the judgment in this case, upon the careful and able opinion delivered at the general term of the court below, and reported in 29 Howard, 20.

It can hardly be doubted, I think, at this day, that, by the general assent of the courts in this state, a covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land, by whatever form of words the agreement is made. *Smith's Landlord and Tenant*, 206; *Taylor's id.*, § 302; *The Mayor of New York v. Mabie*, 3 Kernan, 160; 11 Paige, 566; *Tone v. Brace*, 8 id. 597. *Vernam v. Smith*, 15 N. Y. 328; *Graves v. Bur lan*, 26 id. 498.

The principal question in the cause, and the one chiefly urged

upon our attention on the argument, arises upon the exception to the charge of the judge, in respect to the proper measure of damages. The learned judge instructed the jury that "the measure of damages was the value of the unexpired term of the lease at the time of the eviction, over and above the rent reserved by the terms of the lease."

The rule of damages as thus laid down is clearly in conflict with the rule long settled, and applied in actions upon the personal covenants running with the land in deeds, or upon contracts for the sale of land upon the failure of title. In such cases, the rule generally applied in England and in this country is to restore to the purchaser all he has paid or advanced upon the purchase, with interest and expenses, and to place the vendee as far as possible, in the same condition as if the contract of purchase had never been made. And this has been done upon the basis or assumption of mutual mistake or error between the parties. 4 Kent, 479; Kames' Principles of Equity, vol. 1, 288, 289, *Flureau v. Thornhill*, 2 W. Blackstone, 1078; *Conger v. Weaver*, 20 N. Y. 140. But this court has recently held, in *Pumpelly v. Phelps*, 40 N. Y. 60, that this rule should be limited to cases of good faith, and that when a vendor contracts to sell lands, in which he knows at the time that he has no title, he is bound to make good to the vendee the loss, also, of the bargain sustained by his fault or fraud.

In analogy with the rule thus applied to purchasers of land, in actions upon the covenant for quiet enjoyment in leases, the same rule has been applied to lessees, so far as it was applicable. As no consideration is paid in such case, the rent reserved has been regarded as a just equivalent for the use of the demised premises, and as, in case of eviction, the rent ceases and the lessee is discharged from its payment, he recovers nominal damages, and for such mesne profits as he is liable to pay the true owner, and any costs he may have been compelled to pay in defense of his title. *Kelly v. The Dutch Church of Schenectady*, 2 Hill, 105; *Moak v. Johnson*, 1 id. 99, and *Baldwin v. Munn*, 2 Wend. 399.

But this rule has not been very satisfactory to the courts in this country, and it has been relaxed or modified more or less, to meet the injustice done by it to lessees in particular cases, as will be seen in the cases of *Driggs v. Dwight*, 17 Wend. 72; *Giles v. O'Toole*, 4 Barb. 261; *Chatterton v. Fox*, 5 Duer, 64, and *Deane v. Roesler*, 1 Hilt. 420. In England the rule is repudiated in two well-consid-

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ered cases. In *Williams v. Burrell*, 1 Manning, Granger & Scott, 402; 50 Eng. Com. Law R. 401, it was held by the court of common pleas, in a case referred to that court by the master of the rolls for its opinion, and upon a very elaborate argument, that the lessee, upon a covenant for quiet enjoyment, was entitled to recover the value of the term lost, as well as for mesne profits paid to the owner of the paramount title. The same question came again before that court in *Lock v. Furze*, 19 J. Scott, N. S., 96, and 115 Eng. Com. Law R. 94. The case was very elaborately argued, and the English and American cases carefully reviewed, and the whole court, in opinions given by the four judges, sanctioned, re-asserted and re-affirmed the rule held in *Williams v. Burrell*, *supra*, that a lessee who had been ejected by paramount title was entitled to recover, upon a covenant for quiet enjoyment, the value of the term which he had lost.

And it seems to me that the case of *Trull v. Granger & Dillaye*, 4 Seld. 115, in principle commits this court to the same doctrine. It is true, that, in that case, the plaintiff was not evicted, having never been in actual possession; but his landlord virtually expelled him from the demised premises by leasing them to another party and putting him in possession before the demise of the plaintiff took effect. The plaintiff recovered the value of his term, and this court affirmed the judgment. The same principle is, in effect, also asserted in *Tracey v. The Albany Exchange Company*, 3 Seld. 475. But in *Myers v. Burns*, 35 N. Y. 272, the same principle is clearly asserted and adopted. In this case, in an action for rent on a lease, the defendant set up as counterclaim a covenant of the landlord to keep the premises in repair, and alleged a loss of \$700 damages, occasioned by the loss of the use of four rooms, alleged to be untenable for want of repairs. The jury found \$300 damages for the loss of the use of said rooms. The principle asserted is, in effect, that the tenant, by the act of the landlord, had been virtually evicted from such rooms, and was, therefore, entitled to recover the value of the use of the same as of the loss of part of his term.

But within the principle asserted in this case, in *Trull v. Granger*, and in *Pumpelly v. Phelps*, the plaintiff was clearly entitled to recover the value of his term, and the direction at the trial was entirely correct. The plaintiff was clearly evicted from the premises by the act, procurement and fault of the defendant. He expedited, if he did not instigate, the foreclosure of the mortgage under which the eviction was had. He became a joint purchaser on the

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mortgage sale of the demised premises, and a joint petitioner with Dorsheimer for the writ of assistance under which the plaintiff was evicted from the said premises. It would be a gross wrong, if a landlord could thus conspire and assist in turning his tenant out of possession of demised premises, and the latter be limited, in his action upon his covenant for quiet possession, to mere nominal damages.

The point that the judge erred in deciding, as matter of law, that the defendant was liable to the measure of damages stated in the charge, and that, so far as the question depended upon the good faith of the defendant, it should have been submitted to the jury, is not, I think, well taken. The judge was not asked to submit this question to the jury, and the bad faith of the defendant in the foreclosure proceedings, I think, must have been assumed upon the undisputed facts in the case. I think, however, that the direction of the judge was clearly right as a matter of law, and that the judgment should be affirmed.

Judgment affirmed.

GUILLAUME *et al.* v. HAMBURGH AND AMERICAN PACKET COMPANY. appellants.

(48 N. Y. 212.)

Common carriers — exception in bill of lading — gross carelessness.

The plaintiffs shipped goods by vessel of defendants — common carriers — from England for New York, and received a bill of lading, providing that the defendants should not be liable for loss occasioned, among other things, by "any act, neglect or default whatsoever of the pilot, master, or mariners." On the arrival of the vessel in New York, the officer discharging the cargo, without authority from the plaintiffs, delivered the goods to a carman, who was not empowered by the plaintiffs to receive them, and the goods were thereby lost. *Held*, that the loss was the result of the gross carelessness of the defendants, and was not covered by the exceptions in the bill of lading.

ACTION to recover the value of one case of merchandise, shipped by the plaintiffs, by the steamship of the defendants — common carriers — from England for New York. At the time of delivering the goods to the defendants, the plaintiffs received a bill of lading, containing, among other things, the following exceptions: "The act of

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God, enemies, pirates, thieves, robbers, restraint of princes, rulers and people, vermin, jettison, barratry and collision, fire on board, in bulk or craft, or on shore, and all accidents, loss and damage whatsoever, from machinery, boilers and steam, and steam navigation, or from perils of the seas and rivers, or from any act, neglect or default whatsoever of the pilot, master, or mariners, being excepted; and the owners being in no way liable for any consequences above excepted." On the arrival of the steamship in New York, the mate, or officer who was acting in his capacity, superintending the discharge of the cargo on behalf of the defendants, delivered, without any authority from the plaintiffs, the case of merchandise in question to a carman, who was not authorized by the plaintiffs to receive the same; who did not deliver it to the plaintiffs; and which was never recovered by them.

On the trial, judgment was rendered for the plaintiffs, which was affirmed by the supreme court, at general term; and the defendants brought this appeal.

George C. Barrett, for appellants.

B. F. Watson, for respondents.

INGALLS, J. It is now the settled law of this state, that it is competent for a common carrier and the owner of goods, by agreement, to establish conditions of liability different from those which the law imposes upon the carrier in the absence of any special agreement. *Dorr v. The N. J. S. Nav. Co.*, 11 N. Y. 485; *Bissell v. N. Y. C. R. R. Co.*, 25 id. 442. The question upon this appeal is, whether the exception contained in the bill of lading is comprehensive enough to embrace and excuse the act of the servant of the defendants which occasioned the loss in question. Although the contract in question contains provisions which appear to be somewhat extraordinary, yet it is entitled to a fair construction, as it is the agreement to which the plaintiffs consented, and they, therefore, must be bound by it. From a careful examination and consideration of the instrument in question, I am convinced that the parties could not have intended, by the exceptions contained in the bill of lading, to embrace and excuse an act of gross carelessness, such as occasioned the loss in question. It is obvious, to my mind, that they contemplated only those hazards which attended the transportation of the goods in

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question, and could not have intended to relieve the defendants from liability for the negligent act of their servant in delivering the case of goods to a person who exhibited no authority from the plaintiffs to receive it, and who was not, in fact, by them thus authorized, and that, too, after the goods had been removed from the ship to the wharf. The conduct of the defendants' servant exhibited extreme carelessness, if not recklessness, in delivering the merchandise in question to a stranger, who did not produce any authority from the plaintiffs to receive the same. It would be establishing a dangerous rule to authorize a common carrier to deliver the property of the owner to whomsoever should demand the same, without producing some evidence of authority from the owner to receive the delivery thereof. The defendants might almost as well have thrown the case of merchandise into the ocean, and then sought protection under the bill of lading. I therefore conclude, that a reasonable construction of the instrument in question does not excuse the defendants from liability, and that the decision of the referee was correct.

The judgment should be affirmed, with costs.

Judgment affirmed.

DUFFY v. WUNSCH, appellant.

(43 N. Y. 242.)

Statute of frauds—promise to answer for debt of another.

An oral promise by A. to pay a debt of B., provided C. will discontinue a suit pending against B. for its recovery, is void, under the statute of frauds.

This was an action for money. The following are the facts: One Roller, having a subsisting debt due from Louis Wunsch, brother of the defendant, transferred it to the plaintiff, who commenced an action against Louis Wunsch for its recovery. The defendant, William Wunsch, thereupon verbally promised Roller, that, if he would induce the plaintiff to discontinue that action, he would himself pay the debt. The action was discontinued accordingly; and, afterward, a part of the claim was paid. This action was brought to recover the remainder, based upon the foregoing promise. Judgment was

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rendered for the plaintiff, which was affirmed by the New York common pleas, and this appeal was brought.

G. F. Carpenter, for appellant.

David McAdam, for respondent, cited *Elting v. Vanderlyn*, 4 Johns. 237; *Smith v. Weed*, 20 Wend. 184; *Hilliard v. Austin*, 17 Barb. 141; *Seaman v. Seaman*, 12 Wend. 381; *Palmer v. North*, 35 Barb. 282; *Prentice v. Wilkinson*, 5 Abb. Pr. (N. S.) 49.

INGALLS, J. This appeal presents but one question: Whether the verbal promise of the defendant to pay the debt which his brother had contracted for his own benefit and on his own account, and from which the defendant derived no advantage, was void by the statute of frauds. The revised statutes (vol. 3, p. 221, § 2, 5th ed.) provide as follows: "In the following cases, every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, *be in writing*, and subscribed by the party to be charged therewith: 1. Every agreement that, by its terms, is not to be performed within one year from the making thereof 2. Every special promise to answer for the debt, default or miscarriage of another person." The above section was amended in 1863, so that the consideration for the agreement need not be expressed therein. It is not pretended that there was any note or memorandum of the defendant's promise, or that the defendant received any consideration, or derived any benefit, on account of his promise to pay the debt; nor that the plaintiff parted with any thing of value, or incurred any liability or obligation, in consequence of such promise, unless it be inferred that he became liable to pay the costs of the action which was commenced against the brother of the defendant. There is no proof that he paid the costs of such action. It is very clear that the debt remained uncanceled against Louis Wunsch, and could be collected of him, if responsible, so that the defendant, at most, became surety for his brother. We are clearly of the opinion that the agreement of the defendant was void, not being in writing. It was not an agreement to pay his own debt, but that of his brother, and without any consideration whatever inuring to the defendant. If it be assumed that the discontinuance of the cause against Louis Wunsch furnished an adequate consideration for the defendant's promise, the difficulty still remains, because the agreement was not

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in writing. The case at bar is not, in principle, distinguishable from *Mallory v. Gillett*, 21 N. Y. 413; *Pfeiffer v. Adler*, 37 id. 164; *Brown v. Weber*, 38 id. 184. The judgment should be reversed, with costs.

LORT, J. Assuming the testimony of John Roller to be true, it at most establishes the fact that the defendant promised orally to pay a part of a subsisting debt, then due from Louis Wunsch, his brother, to Charles Duffy, if Duffy would discontinue a suit commenced for its recovery, and that the condition was fulfilled. It is, in fact, a special promise by him to answer for the debt of his brother, and conceding that the discontinuance of the action was a sufficient consideration for the promise, it was, nevertheless, void under the statute of frauds, which declares that every special promise to answer for the debt, default or miscarriage of another person shall be void, unless the agreement, or some note or memorandum thereof, expressing the consideration, be in writing, subscribed by the party to be charged therewith. The promise was not made or accepted in the place or as a substitute of the original debt, or in extinguishment thereof; on the contrary, Louis Wunsch continued liable for the amount or balance thereof, which the defendant agreed to pay. I see no ground on which the defendant can be held liable on the promise, and give effect to the statute, and the case of *Mallory v. Gillett*, 21 N. Y. 412, is a conclusive authority against the plaintiff's right of recovery.

The judgment of the court below must be reversed with costs.

Judgment reversed.

BURTIS V. THOMPSON, appellant.

(42 N. Y. 244.)

Breach of promise to marry — refusal to perform before time for performance.

The plaintiff and defendant entered into a contract to marry "in the fall." In October the defendant expressly refused to marry the plaintiff at any time. *Held*, that an action for breach of the contract, commenced on the 25th of October, was not prematurely brought.

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PER GROVER, J. One who contracts to marry at a future day, and, before that day arrives, refuses to perform the contract at any time, is instantly liable to an action for breach of promise to marry.

APPEAL from a judgment entered upon the decision of the supreme court at general term, affirming a judgment entered upon a verdict in favor of the plaintiff for the sum of \$2,000. The facts are set forth in the opinion of INGALLS, J.

R. W. Van Pelt, for appellant.

J. W. Tompkins, for respondent.

INGALLS, J. This action was commenced by the plaintiff to recover damages for the breach of a promise of marriage, and she recovered a verdict of \$2,000, upon which judgment was rendered, and the same was affirmed by the general term. The promise was clearly proved, and the defendant, in the early part of October, 1862, expressly refused to marry the plaintiff at any time, and this action was commenced on the 25th October, 1862. The defendant's counsel requested the court to charge the jury, "that the action was prematurely commenced, inasmuch as the defendant's promise was to marry in the fall of 1862, and that season had not elapsed when this suit was commenced." The court refused so to charge, and the defendant's counsel excepted. The court did charge as follows:

"That the absolute refusal of the defendant to marry the plaintiff gave her the right to sue at once." To which the defendant's counsel excepted. The evidence leaves the time very uncertain when, by the contract, the marriage was to occur. The plaintiff states as follows: "No day was fixed for the marriage, but there was a time agreed upon; it was to have taken place in the fall in which he left (of 1862). It was to have been during that fall; I don't recollect that the month was named. I got every thing that was necessary. I did not get dresses to carry out the engagement; I procured some dresses for the express purpose of carrying out the engagement; I told him I was preparing."

The defendant testifies in regard to it as follows: "I fixed no particular time to marry; no particular day or month; I might have said in the fall of 1862; I don't remember." It was in *the fall* of 1862 that the defendant refused to marry the plaintiff, and thereupon this action was commenced. Under the facts of this case, I do not think the court was called upon to hold, that, after the

unqualified refusal of the defendant, in the fall of 1862, to marry the plaintiff, she was compelled to wait until winter before she commenced the action. The season of the year had arrived when, according to the most favorable view of the evidence for the defendant, he had agreed to perform his contract, and had absolutely refused. We do not think the defendant was entitled to defeat the plaintiff's action, and impose upon her the payment of a bill of costs, upon the ground that he had some thirty-six days, at the time the action was commenced, within which to repent, and retract his refusal. Especially so, when, at no time, did he evince a disposition to do so. I do not think the facts of this case require us to express an opinion, whether, when by a contract of marriage a particular time is clearly fixed for its performance, and a party to it absolutely refuses to perform the contract, the other party is compelled to wait until the expiration of such time before commencing an action.

The judgment should be affirmed with costs.

GROVER, J. The exception taken by the defendant's counsel to that part of the charge instructing the jury that the absolute refusal of the defendant to marry the plaintiff gave her the right to sue at once, raises the question whether such refusal will sustain an action commenced thereafter, but before the time agreed upon for the celebration of the marriage. It is a general rule, that an action commenced upon a contract, before a breach thereof by the defendant, is premature, and cannot be maintained. Indeed, this rule may be regarded as universal, as the idea of maintaining an action for the recovery of damages upon a contract against a party who had not been guilty of a breach would be absurd. The inquiry is, therefore, whether one who has contracted to marry another at a future day makes himself responsible for a breach thereof, by notifying the other party that he has determined to put an end to the contract, and that in no event will he ever perform it, before the arrival of the time for performance. This must be held a breach, or otherwise as having no effect upon the contract, because, if not a breach, the contract will remain in force, mutually obligatory upon the parties. Can it for a moment be contended that the plaintiff continued bound by the contract after the receipt by her of this notice from the defendant? and that if thereafter, and before the day fixed for the marriage, she had intermarried with another, the defendant could have maintained an action against her? If not,

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upon what principle is her defense based? Manifestly upon the ground that she was discharged by the prior breach of the defendant.

In *Short v. Stone*, 8 Q. B. 358, it was held, that a man, who had promised to marry a woman on a future day, and, before that day arrives, marries another woman, is instantly liable to an action for breach of promise of marriage. Upon what principle was this determination based? Clearly, that, by the marriage of the defendant, he had incapacitated himself to perform his contract with the plaintiff, and thereby rendered it certain that such contract never would be performed, or that the marriage with another was such a violation of the obligation to the plaintiff, imposed by the contract upon the defendant, as, of itself, to constitute a breach, relieving her from the obligation to perform, should the defendant's capacity be restored by the death of his wife, before the arrival of the day. In what respect does the present case differ in principle? Here, the defendant renounced the contract, and declared that he never would perform it. Does it now lie in his mouth to say that this did not render it certain that he never would perform his contract, or that this was not such a violation of his obligation to the plaintiff, incurred by the contract, as to exonerate her from its obligation? Any conduct by a party who has promised to marry another, that will render the contract no longer obligatory upon that other, is a violation of the duty and obligation created by the contract, and may, therefore, be treated by the injured party as constituting a breach. Clearly, notifying the other party of a settled determination not to perform the contract is such an act. Annoying and distressing the feelings of the plaintiff in this way, whether the defendant was in earnest or not, fully justified the plaintiff in treating the contract as broken by the defendant. The plaintiff's counsel insists, that, if this is the law to be applied in the present case, it will follow, that the maker of a note due at a future day will make himself liable to an action instantly by declaring to the holder that he will never pay it. This conclusion does not at all follow. In the case of such a note, the holder is in no respect damnified until payment is withheld after it is due. Until this happens, no legal right of his has been violated by the maker. He has sustained no injury from the declaration of the maker. Not so in the present case. The defendant, in a legal sense, had rendered it certain that the plaintiff had lost absolutely all benefit to be derived by her from the contract. He had wrongfully caused her all the distress of

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wounded feelings that a breach by him at the day would inflict, which is an essential consideration in estimating her damages. In *Hochster v. De Lataur*, 20 Eng. Law & Eq. 157, it was held, that a party who had contracted with another to enter his service as a carrier on the 1st day of June thereafter, became liable to an action before that day by giving notice of his refusal to employ him according to the contract. While not fully prepared to concur in the judgment in this case without further consideration, yet the reasoning of the learned judge, when applied to the facts in the present case, clearly shows the correctness of the charge upon the point under consideration.

The judgment of the supreme court should be affirmed with costs.

Judgment affirmed.

NOTE.—In the case of *Frost v. Knight*, 39 Law J. Rep. 227; 19 Weekly Rep. 77, decided by the court of exchequer in July, 1870, the defendant had agreed to marry the plaintiff when his father died. During his father's life-time the defendant wholly renounced the contract, and refused to be bound any longer by his promise. The plaintiff thereupon, and before the death of the father, brought an action for breach of promise to marry. The court *held* (Martin, B., dissenting), that the action was prematurely brought and could not therefore be sustained. The court declined to be governed by the decision in *Hochster v. De La Tour*, cited above by GROVER, J., on the ground that the principles of that case did not apply to a contract to marry on the happening of a certain event. The only reason given for applying different principles to a case of a promise to employ a servant and to a promise to marry at a future time was, that in the latter case the measure of damages would be very difficult of computation.

The case of *Short v. Stone*, cited by GROVER, J., was declared to be an authority only to the point, that if a man who has promised to marry the plaintiff within a reasonable time after request, marry another woman, an action is maintainable against him for a breach of the promise without any averment of a request.

In the *Danube Railway Co. v. Xenos*, 11 C. B. N. S. 152; 13 C. B. N. S. 825, ERLE, C. J., says: "Where there is an explicit declaration by the one party of his intention not to perform the contract on his part, which is accepted by the other as a breach of the contract, that, beyond all doubt, affords a cause of action." The case of *Ford v. Tilley*, 6 B. & C. 325, which was a contract to execute a lease for a certain term from a future day, and when the defendant had executed a lease for the same term to another; and *Bowdell v. Parsons*, 10 East, 355, where the defendant had contracted for the delivery of a quantity of specified goods to the plaintiff on a future day, and before that day had sold and delivered them to another person, are authorities to the point, that an act which renders the performance of a contract at a future day impossible may be the subject of an action. — REP.

BARKER v. BRADLEY *et al.*, extra, appellants.

(48 N. Y. 216.)

Statute of frauds — promise to pay debt of another — evidence

An oral promise by B. made to C., and upon consideration passing between him and C., to pay a debt due from C. to the plaintiff, is a valid promise, and the plaintiff can maintain an action thereon.

Parol evidence of a verbal agreement is competent, although written instruments have been subsequently executed in part performance of such agreement.

APPEAL from a judgment of the supreme court at general term, affirming a judgment entered upon a report of a referee. The facts appear in the opinion of Ingalls, J.

Cary & Bolles, for appellants.

A. G. Rice, for respondent.

INGALLS, J. The Luna Lumber Company, a partnership firm consisting of the plaintiff, Anthony Fay, David Harrower, and the testator, Samuel W. Bradley, failed, and the property of the firm passed into the hands of Benjamin Chamberlain, who was a creditor of the firm. Chamberlain applied to the plaintiff to release his interest in the property, and offered to pay the plaintiff \$2,000, and indemnify him against liability for the debts of the company; which offer was accepted by the plaintiff, and the following instruments were executed by the parties respectively:

"Received, East Randolph, February 4, 1865, of B. Chamberlain, one dollar in full of all demands; also, in full of all demands against the Luna Lumber Company, and all the members thereof, which demands I assign to B. Chamberlain without recourse to me.

"BENJAMIN BARKER."

{ 5 cent revenue }
{ stamp affixed }
{ and canceled. }

"Received, East Randolph, February 4, 1865, of Benjamin Barker, one dollar in full of all demands, and I am to clear him of all liability on account of the Luna Lumber Company, together with all notes and papers taken up against said company by me.

"B. CHAMBERLAIN."

{ U. S. stamp }
{ canceled. }

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The \$2,000 was not paid. In 1867 a final settlement was made between Chamberlain and Samuel W. Bradley, and the property of the company, to the value of about \$250,000, held by Chamberlain, as the evidence pretty clearly shows, as the agent of Bradley, or in some other capacity for his benefit, was transferred by Chamberlain to Bradley; and at the time of such transfer the claim of Barker for the \$2,000 was discussed, and Chamberlain proposed to retain it out of the fund, but Bradley declined to have it retained by Chamberlain and promised to pay the same to Barker. Such was, in substance, the arrangement. I perceive no substantial reason why Bradley did not render himself liable to Barker for the \$2,000. If Chamberlain acted as the agent of Bradley in making the arrangement with Barker, the unqualified recognition of his acts by Bradley, at the time of the transfer of the property to him, amounted to a ratification of the acts of Chamberlain, and rendered Bradley clearly liable. If, on the other hand, Chamberlain was not to be regarded as the agent of Bradley, then the latter became liable to pay Barker in consequence of receiving of Chamberlain the property, coupled with a promise on the part of Bradley to pay Barker the money. The effect of such transaction was to create a cause of action in favor of Barker against Bradley for the money which Chamberlain placed in his hands for the benefit of Barker, and which Bradley agreed to pay to Barker. *Burr v. Beers*, 24 N. Y. 178; *Lawrence v. Fox*, 20 id. 268; *Barker v. Bucklin*, 2 Denio, 45; *Judson v. Gray*, 17 How. 289; *Farely v. Cleveland*, 9 Cowen, 639. The defendants are in no situation to insist that the \$2,000 cannot be recovered, because not evidenced by a written instrument executed at the time the papers were exchanged between Chamberlain and Barker, for the reason that the promise of Bradley was subsequent to the execution of such papers, and was founded upon a good consideration passing to Bradley. The judgment should be affirmed with costs.

EARL, C. J. While the evidence in this case is not as satisfactory as could be wished, yet, under the rules applicable to appeals in this court, it must be considered as established, that, in the fall of 1864, Benjamin Chamberlain agreed to pay the plaintiff \$2,000 for his interest in the property of the "Luna Lumber Company," and that subsequently the testator, Samuel W. Bradley, upon a consideration passing between him and Chamberlain, promised to pay the \$2,000

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to the plaintiff. Upon such a state of facts, I think there can be no doubt of the plaintiff's right to recover. *Barker v. Bucklin*, 2 Denio, 45; *Lawrence v. Fox*, 20 N. Y. 268; *Judson v. Gray*, 17 How. Pr. 289. Upon the trial, it was claimed by the defendants, that the agreement between the plaintiff and Chamberlain was reduced to writing in the two instruments dated February 4, 1865; and, as nothing was said in these instruments about the payment of the \$2,000, that it was incompetent for the plaintiff to prove by oral evidence the parol agreement to pay it, and they objected to such evidence. The referee overruled the objection and received the evidence, and the defendants excepted. In this I cannot perceive that the referee committed any error. The general rule is not controverted, that parol evidence is inadmissible to vary, explain or contradict a written agreement. Where the parties have reduced an agreement to writing, the writing is supposed to contain all the agreement, and is the only evidence of it; and all prior or contemporaneous declarations and negotiations between the parties are excluded as evidence of the agreement, or any part of it. But here the agreement was not reduced to writing. It was intended by the parties to rest in parol, and the written instruments were subsequently executed in part execution of the parol agreement, and not for the purpose of putting that agreement in writing. It is well settled, that a written instrument, thus executed, does not supersede a prior parol agreement. *Renard v. Sampson*, 12 N. Y. 561; *Thomas v. Dickinson*, 2 Kern. 364; *Hutchins v. Hubbard*, 34 N. Y. 24; *Bowen v. Bell*, 20 Johns. 340; *Johnson v. Hathorn*, 3 Keyes, 126; *McCullough v. Girard*, 4 Wash. C. C. 289; *Mowatt v. Ld. Londesborough*, 3 Ellia. & B. 307. It is clear that the nominal consideration of one dollar was inserted in each instrument, not for the purpose of expressing the true consideration, but merely to make the instrument operative; and the agreement to pay the true consideration was left in parol. But if these said instruments had been executed at the time of the parol agreement, and are to be regarded as containing the agreement between the parties in the sense claimed by the defendants, yet neither party would be concluded by the consideration expressed. In reference to all instruments, acknowledging the receipt of a consideration, in the form contained in these instruments, it is now well settled, that it is competent by parol to show that no consideration was in fact paid or received, or that the consideration was greater or less than, or different from.

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the one expressed. This may be done for every purpose, except to impeach or destroy the instrument. The amount or kind of consideration is not considered an essential part of the contract, and is open to contradiction or explanation, like a common receipt. *Prink v. Green*, 5 Barb. 456; *Bingham v. Weiderwax*, 1 N. Y. 509; *Murray v. Smith*, 1 Duer, 412; *McCrea v. Purmort*, 16 Wend. 460. Within these cases, no rule of law was violated by the admission of the parol evidence, to show that Chamberlain agreed to pay the plaintiff \$2,000, instead of the one dollar, the receipt of which was acknowledged. I therefore reach the conclusion that the judgment should be affirmed.

Judgment affirmed.

HATHAWAY, admr., appellant, v. BRAYMAN.

(43 N. Y. 332.)

Chattel mortgage — sale of mortgaged property — conversion.

A mortgagor of chattels in possession has a right before default to sell and deliver the mortgaged property subject to the mortgage, and if the purchaser dispose of it again before default in payment, and before demand of possession, he will not be liable for conversion.

ACTION for the alleged wrongful conversion of a mare. In September, 1863, Stevens & Rush, then owners of the mare in question, mortgaged her to the plaintiff, to secure the payment of a note. The mortgage was to become due on the 1st of November then next, and was duly filed. It contained the following provision: "In case of non-payment at the time above mentioned, said Hathaway shall have full right to take possession of said property, sell the same at public or private sale, applying the avails of such sale in payment of said debt, after deducting all expenses and paying all charges; and in case said Hathaway shall at any time deem himself unsafe, it shall be lawful for him to take possession of said property at any time," etc.

The mare remained in possession of the mortgagors until in October, when they disposed of her to the defendant. Shortly after, the defendant disposed of her to one Oliver, in whose possession she remained until about the middle of November, when she died. Defendant never had notice of the mortgage until the February following, when a demand was made on him by the plaintiff for the mare.

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The action was brought before a justice of the peace and judgment rendered for the plaintiff. The judgment was reversed by the county court. On appeal to the supreme court the decision of the county court was affirmed, and the plaintiff brought this appeal.

John H. Reynolds, for appellant.

A. McDowell, for respondent.

FOSTER, J. The only case referred to by the appellant's counsel, which is in point, is that of *Chadwick v. Lamb*, 29 Barb. 518; and it was there decided, that an action to recover the value of personal property wrongfully converted may be maintained by the chattel mortgagee, although the money secured by the mortgage is not yet due, if there is a clause in the mortgage which authorizes the mortgagee, at any time he shall deem himself insecure, to take possession of the mortgaged property, and sell it to satisfy the debt.

But that doctrine was expressly repudiated by this court in *Hall v. Sampson*, 35 N. Y. 277, where the court, PORTER, J., said: "The execution of the chattel mortgage invested the plaintiff with title, subject to be dissolved by subsequent performance of the condition. The right of possession ordinarily follows that of property, and both would have passed under the transfer, in the absence of any express or implied agreement for the retention of the goods by the mortgagor. It has been held in some of the cases, that no such agreement can be implied from provisions substantially like those contained in the present mortgage. *Rich v. Milo*, 20 Barb. 616; *Chadwick v. Lamb*, 29 id. 518. The court below held otherwise, and in their conclusion on this branch of the case we concur. The mortgage specifically defined the circumstances under which the mortgagee should become entitled to the right of possession; and this evinces the mutual intent of the parties, that, until it vested in the mortgagee, it should remain in the mortgagor. His possessory right was to terminate on failure to pay the debt at the time named, or at such certain time as might be fixed by the election of the mortgagee, if, in good faith, he should deem himself insecure. On the 29th of June there had been no breach of the condition; and we entertain no doubt that Walpole (the mortgagor) had then an interest in the piano which justified the defendant in taking it under the attachment."

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The case of *Mattison v. Baucus* only decides that, when the chattel mortgage is such that the mortgagee is to have, possess, occupy and enjoy the mortgaged property, whenever he shall demand the same, and he has taken the possession thereof by virtue of the mortgage, it is not thereafter the subject of a levy upon execution against the mortgagor, although the mortgage debt had not become due.

Under the rule laid down in *Hall v. Sampson*, the rights of the mortgagor and mortgagee are the same as they would have been if the mortgage had contained the express condition that the mortgagor was to continue in the possession until default in payment, or until the mortgagee should deem himself unsafe, and should, in consequence thereof, take possession. And, under such a mortgage as that, the rule clearly is, that, prior to such default or taking possession, the mortgagor has an interest in the mortgaged property which may be levied upon by execution against him, and will authorize the sheriff to take the property into his possession and sell it without reference to the mortgage, and the remedy of the mortgagee in such case is to follow the property into the hands of the purchaser, and require its delivery to him or the payment of his mortgage debt. *Hall v. Sampson*, *supra*; *Hull v. Carnley*, 11 N. Y. 50; *Same v. Same*, 17 id. 202; *Goulet v. Asseler*, 22 id. 228.

It is equally clear, that, while the mortgagors retained possession, they could sell and deliver the mare to the defendant, and that he took all the interest the mortgagors had thereto, and held it subject to the mortgage, whether he was aware of its existence or not; and on the 26th of October, there being no default in the payment, and no possession taken by the mortgagee, he had the right to dispose of it to Oliver, who also took it subject to the mortgage, and the remedy of Hathaway was to follow it and recover it from his possession. This he did not do, either under the safety clause or after default in the payment of the mortgage, but suffered it to remain in his possession until it died of a disease which it had when the mortgage was executed; and a demand for the mare, made upon the defendant in the following February, did not authorize him to support the action. The defendant had the right to purchase and exchange the mare away as he did; and he was not guilty of a conversion, either in acquiring or parting with his interest in her.

The judgment of the supreme court should be affirmed.

Judgment affirmed.

Dexter v. The Syracuse, Binghamton and New York Railroad Co.

DEXTER, admr., v. THE SYRACUSE, BINGHAMTON & NEW YORK
RAILROAD COMPANY, appellants.

(43 N. Y. 336.)

Passenger carriers—liability for lost baggage—nature of baggage.

The right of a traveler to recover of a carrier for lost baggage is not limited to such apparel or other articles as he expects to need or use by the way, but extends to such baggage as is ordinarily carried by passengers.

The plaintiff purchased in New York, and checked over defendants' road, as baggage, a trunk and contents, consisting of wearing apparel for himself and wife, articles for members of his family, and cloth for some dresses, including one for his landlady. The trunk was lost, and in action to recover the value of it and contents, *held*, that defendants were liable, except for the cloth purchased for landlady.

ACTION to recover the value of a trunk and its contents. The plaintiff's intestate purchased, while in New York, the trunk and its contents, consisting of wearing apparel for himself, some for his wife, and various articles for members of his family, including the material for three dresses, one of which was for his landlady. He returned to his home at Cortland over the defendants' road, his trunk having been duly checked as traveler's baggage. On arriving at Cortland, he presented his check and demanded his trunk, which was not delivered, and was not afterward found by defendants. At the trial, the defendants moved for a nonsuit, on the ground that the trunk and contents were not baggage, not being necessary for the use, comfort and convenience of the plaintiff's intestate on his journey. The request was denied, and the jury, under the direction of the court, returned a verdict for plaintiff for the sum of \$304, that being the value of the trunk and contents. This verdict was sustained by the supreme court at general term, and this appeal was brought.

Oliver Porter, for appellants.

Milo Goodrich, for respondent.

E. DARWIN SMITH, J. The points made upon the motion for a nonsuit present the true theory of the defense, and present for dis-

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cussion and consideration the true principles upon which the right of action of the plaintiff depends. The requests to charge, and the propositions submitted to the circuit judge, are simply reiterations in a different form, quite needlessly made, of the same points or questions. It is not denied, and cannot be, in view of the numerous decisions on the subject in this state and in others, that the defendants, as a carrier of passengers, are responsible for the carriage and safe delivery of such baggage as, by custom and usage, is ordinarily carried by travelers, and that the payment of the usual fare includes, in contemplation of law, a compensation for the conveyance of such baggage. *Edwards on Bailment*, 580; *Story on Bailment*, 499; *Orange County Bank v. Brown*, 9 Wend. 114; *Pardee v. Drew*, 25 Wend. 460; *Powell v. Meyers*, 26 Wend. 591; *Merrill v. Grinnell*, 30 N. Y. 594.

The difficulty is not with the rule of law, but with its particular application to the facts of the case.

It is for the obvious interest of the carriers of passengers to encourage travel, by allowing the passenger to take with him, as baggage, whatever he may deem proper or desire for his necessity, comfort, convenience, pleasure or amusement, on the journey, or on his stay away from his home, within reasonable limits.

The question, as held in *Merrill v. Grinnell*, where property lost by a traveler is claimed as baggage, is, whether it is, or was, a reasonable description, or class, and amount of baggage, in view of the condition in life of the passenger, the extent and object of his journey, the time of his contemplated absence from his home, and other particular circumstances of the case. The error, I think, in the argument of the defendants' counsel, as presented at the trial on his motion for a nonsuit, and in his numerous requests, is in the claim that the baggage which a traveler may take, and the carrier must safely transport and deliver, is limited to such apparel or other articles as "were absolutely" necessary or material for his use, comfort or convenience on his journey, or while away from his home. In this case, the plaintiff's husband was away from his home without a trunk, or any articles of wearing apparel, so far as we can see from the evidence, except such as he had upon his person. The trunk and apparel, for which the action was brought, were purchased in the city of New York, to take with him on his return home. He probably did not need, or intend to use, any portion of it by the

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way. He left New York at six o'clock P. M., and arrived at his home in Cortland the next morning or forenoon.

The argument of the counsel, in effect, is, that, having no occasion for the use of the clothing or other articles contained in the trunk on the way, he had no right to carry them as baggage, at the risk of the carrier, or any baggage. Such a rule would, I think, be too strict and narrow for these times, when steamboats and railroads have so wonderfully increased the temptations and facilities for travel, and superseded the old modes of transportation by stage-coaches, canal and river boats, and other ways as means of transportation from place to place, formerly in use.

It would be a more fair rule to hold the carrier responsible for whatever he received as baggage from the traveler, within such limits as to weight and amount as the carrier might fix and prescribe. Public carriers and the courts, I think, have been growing more liberal on this subject of late than formerly. The case of *Merrill v. Grinnell* indicates the growth of a spirit of progress and expansion on this subject, corresponding with the great increase of travel and intercommunication among the people in modern times.

In this case the assignor of the plaintiff and the owner of the trunk, for whose loss, with its contents, the action was brought, was allowed to recover for many articles of clothing, besides money, that the passenger did not need to use by the way. He was an emigrant from Germany to New York, and purchased his ticket at Hamburg for the transportation of himself and baggage to New York, *via* Hull and Liverpool; his baggage consisting of a black leather trunk and its contents, consisting of a large amount of wearing apparel, among which were six dozen shirts, two swords, valued at \$68, \$800 in gold, and other articles, valued in all at \$1,991.27. This court allowed the plaintiff to recover for all these articles. The chief controversy related to the money. It is quite apparent that of these materials of wearing apparel, very few, and of the money very little, if any, were requisite for the use of the passenger by the way. His ticket for transportation was paid for at Hamburg before he started, and it does not appear that he sought or had occasion to open or to take any thing from his trunk before his arrival in New York, where, upon demand for it, it was found to have been stolen or lost.

This case, I think, clearly establishes that the right of the traveler to recover of the carrier for lost baggage is not limited to such

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apparel or other articles as he expected to use or needed by the way. I think a young man, for instance, may start from his eastern home to remove to and take up his residence in a western state or city, and take with him his ordinary wearing apparel, though he might not need or expect to use a single article of it by the way, except such as he wore upon his person; and I cannot admit that it would be a sound rule of law to hold that, if a gentleman from the interior of the state or country should purchase in New York or in any other city a new coat or a new suit of clothes for his own use and put it into his trunk, he could not recover of the carrier for its loss, because he did not expect to stop to wear it or to put it on by the way. With the exception of the few articles purchased for his wife and other members of his family, the contents of the trunk in controversy in this action consisted of articles of male attire suitable for the condition of the plaintiff's husband, and purchased and designed, as he testified, for his immediate personal use.

The case is not one where there was any fraud practiced or intended upon the carrier, or any implied misrepresentation that the articles were apparel or clothing, when, in fact, they were merchandise, as in the case of *Pardee v. Drew*, 25 Wend. 460. In that case the plaintiff was a merchant, residing at Delhi, in the county of Delaware. He put on board the defendant's steamboat, in New York, a trunk to be transported to Catskill, and took passage himself at the same time to accompany the trunk home, where he would doubtless, in the ordinary course of travel, arrive on the same day. The trunk was filled with silks and other fine goods, of the value of about \$300, purchased for sale, and contained nothing else. The plaintiff recovered for the value of the trunk and its contents at the circuit, and the supreme court set aside the verdict and granted a new trial, on the ground that the trunk was filled with *merchandise*. Chief Justice Nelson said the trunk did not contain an article for the personal convenience of the traveler; "that the contents of the trunk had no necessary connection with the baggage which it is customary to allow passengers to carry for a journey."

He said, also, that the representation of the trunk and the contents as baggage, in the customary sense, was unfair, and calculated to impose upon the captain, which of itself would exonerate the defendants." This is the true ground on which the carrier is exempt from liability in such cases. The implication, upon the facts of this case, is, that if the trunk had contained the customary baggage, that is,

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clothing and articles designed for personal use of plaintiff and his family, he would have been entitled to recover, although the trunk was purchased in New York and simply transported to the plaintiff's home with him on his return home. This case is put upon the express ground that the contents were *merchandise* and not personal baggage. It virtually admitted, that, if the trunk had contained such baggage as is customarily taken by travelers, the defendant would be liable. And in that case, it is quite apparent, that, if the trunk had been then filled with wearing apparel, the plaintiff could hardly be expected to use or need it on his way home. It would have been taken for use after his return to his home. The rights of the traveler in respect to his baggage cannot, I think, properly rest upon a rule so restricted as claimed by the defendant; one which would operate so harshly and unreasonably upon the traveling public. If the plaintiff's husband had taken this trunk and its contents with him when he left home, it could scarcely be pretended that he was not entitled to take it home with him from New York as personal baggage, at the risk of the carrier. I think he was entitled to equal protection for it on his journey homeward from New York. No fraud was perpetrated or designed upon the railroad company. The trunk was of such description with its contents as was customarily taken and carried unquestioned by all travelers. There was really no dispute about the facts at the circuit, and the direction of the circuit judge to the jury to render a verdict for the plaintiff was therefore not erroneous, and the judgment at the general term should be affirmed.

But a majority of my brethren think that the dress purchased by the deceased for his landlady at the cost of seven dollars should not have been embraced in the verdict, and that the plaintiff was not entitled to recover for that sum. The judgment should, therefore, be modified, by striking out the said sum of seven dollars, and the interest thereon from the date of the verdict be deducted therefrom; and, for the residue, the judgment should be affirmed.

Judgment so modified and affirmed, with costs.

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PURDY, admr., appellant, v. HUNTINGTON.

(43 N. Y. 334.)

Mortgage—merger—unrecorded assignment—priority of liens.

J. M. gave a mortgage on real estate to M. M., who on the same day duly assigned it to plaintiff. Subsequently, and after maturity of the mortgage, J. M. conveyed in fee the same premises to M. M., the mortgagee. M. M. thereafter conveyed the premises to the defendant. The mortgage was duly recorded soon after its date. The assignment and the deed from J. M. to M. M. were not recorded until after the date of the conveyance to the defendant. Nor was the assignment recorded until after defendant's deed. In an action to foreclose the mortgage, *held*,

1. That the conveyance of the mortgaged premises to the mortgagee did not merge the mortgage.
2. That the defendant was not entitled to protection as a *bona fide* purchaser, without notice of the assignment.
3. That the lien of the plaintiff's mortgage was not invalidated by reason of his neglect to have the assignment recorded until after the recording of the deed to the defendant.

ACTION to foreclose a mortgage. The following are the facts:

On the 4th of June, 1855, Minott Mitchell, being seized in fee of certain lands, sold and conveyed them to his son, Joseph S. Mitchell, who at the same time executed back to Minott Mitchell a bond in the penalty of \$4,000, conditioned to pay to him \$2,000, the purchase-money, with interest, and a mortgage on the lands to secure the payment of the bond.

Thereafter, but on the same day, Minott Mitchell, by an assignment in writing under his hand and seal, valid and effectual as between the assignor and the assignee, assigned the bond and mortgage to Benjamin H. Purdy, the original plaintiff and the present plaintiff's intestate.

About three years after such assignment, and on the 10th day of July, 1858, Joseph S. Mitchell reconveyed the lands to Minott Mitchell. Subsequently, and on the 3d day of October, 1859, Minott Mitchell sold and conveyed, by a deed with covenant of seisin and warranty, the lands to the defendant and appellant, Calvin Huntington, for a valuable consideration paid therefor by said Huntington, who took such conveyance and paid such consideration without any actual notice or knowledge of the mortgage which had

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been so assigned to, and was then held by, Benjamin H. Purdy, and without making or causing any search of the records, relying upon Minott Mitchell's representations that he had a good title, free from incumbrances.

The mortgage was duly recorded on the 28th of June, 1855. The deed, or reconveyance, from Joseph S. Mitchell to Minott, was duly recorded on the 6th of October, 1859. The deed to Calvin Huntington was duly recorded the 9th of January, 1862. The assignment of the bond and mortgage to Benjamin H. Purdy was not recorded until the 19th day of February, 1864, on which day it was duly recorded.

On these facts the referee directed judgment for foreclosure which was reversed on appeal by the supreme court at general term. From the order of the general term the plaintiff brought this appeal

Samuel Hand, for appellant.

Noah Davis, Jr., for respondent.

Lorr, J. It was claimed by the defendant, Calvin Huntington, in his answer and on the trial, that the mortgage in question was merged in the conveyance from Joseph S. Mitchell, the mortgagor, to Minott Mitchell, the mortgagee, after its maturity, and was thereby discharged and ceased to be a lien, and if not so merged then, that he was to be protected as a *bona fide* purchaser of the mortgaged premises without notice of the assignment of the mortgage to the plaintiff's intestate, and that it was discharged by the delivery of the deed thereof from Minott Mitchell to him. Neither of those positions is sound. It is clear that there was no such merger. When the premises were conveyed by Joseph to Minott Mitchell, the mortgage had been assigned to the plaintiff's intestate and was then held by him, and the fact of such assignment was known by both of the parties to that conveyance, and it was the intention of both that the lien of the mortgage should continue. The necessary elements to constitute a merger were therefore wanting. The interests of the mortgagee and owner were not united in Minott Mitchell. Without such union, there could be no merger.

The question is then presented, whether Calvin Huntington can be protected in his title as against the mortgage by reason of the omission to have the assignment thereof recorded.

It is conceded that he is to be charged with constructive notice of the existence of the mortgage, and of the continuance of its

lien, by its record in the proper office. By that he was informed, not only of the date of the mortgage, the amount secured thereby, and of all its particulars, but that it was open and uncanceled of record, and therefore apparently an outstanding lien and incumbrance on the premises of which he was taking title. Having that information, he knew, or was at least chargeable in law with the further notice, that it was such lien and incumbrance in the hands of any person to whom it had been legally transferred, and that the record of such transfer was not necessary to its validity, nor as a protection against a purchaser of the property mortgaged, or any other person than a subsequent purchaser in good faith of the mortgage itself or the bond or debt secured thereby; but, on the contrary, that a vendee of the premises took it subject to the lien of the mortgage, irrespective of the ownership thereof. That knowledge and notice made it his duty, in the exercise of proper diligence, to inquire whether Minott Mitchell, his vendor, was still the owner and holder of the mortgage, and his omission to make that inquiry deprives him of the protection of a *bona fide* purchaser. These principles are fully established by the decision of this court in *Brown v. Blydenburgh*, 7 N. Y. 141; *Kellogg v. Smith*, 26 id. 18; *Gilligg v. Maas*, 28 id. 191, etc.; and *Campbell v. Vedder*, 3 Keyes, 174. See also *Raynor v. Wilson*, 6 Hill, 469; *Read v. Marble*, 10 Paige Ch. 409; and *New York Life Insurance & Trust Co.*, 2 Barb. Ch. 82.

Having no actual knowledge of the existence of the mortgage, and having, by his neglect to examine the records, failed to obtain the notice which they would have given him, he incapacitated himself from making specific inquiries in relation to it, and, as was well said by the learned referee, in his well considered and able opinion, "he cannot now insist that the plaintiff's security should be set aside in his favor. If, by the neglect of the plaintiff to record his assignment, the parties are equally in fault, the plaintiff having the prior equity, must prevail."

The general term of the supreme court, if I correctly understand the opinion of the learned justice who delivered it, on the reversal of the judgment founded on the referee's decision, appears to have based that reversal on the ground that the records justified the conclusion, and warranted Huntington, when he took his deed, in the assumption that Minott Mitchell had not parted with the mortgage and had taken the title in extinguishment of it. He says: "The

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referee correctly held that the rights of the defendant, Calvin Huntington, as the purchaser of the premises embraced in the mortgage previously assigned by his vendor to the plaintiff, are to be determined by the records in the clerk's office, and the facts fairly to be inferred from what was there stated."

He then assumes a very material fact, and on which his conclusion was principally if not entirely based, as appearing by those records when Huntington took his deed, which in reality did not appear. After referring to the circumstance disclosed by the evidence, as well as by those records, that Joseph S. Mitchell acquired his title to the premises from Minot Mitchell, under a deed bearing even date (4th June, 1855) with the said mortgage, which he assumes, and as I concede to be fairly inferable, to have been given for a part of the purchase-money, although the fact is not found by the referee, he says (and I deem it material to set forth the statement in full), that Huntington, by examination, "would have learned from said records that three years afterward, and five days after said bond and mortgage became due and payable (July 10th, 1858), the said Joseph S. Mitchell reconveyed the said premises to the said Minott Mitchell for the same consideration expressed in the deed without covenants." He then adds: "The legitimate inference from those facts, which embrace all the information to be derived from the registry of deeds and mortgages in the county clerk's office of Monroe, where the land was situated, was, that the sale from Minott Mitchell to Joseph S. Mitchell was rescinded, and Minott took back his deed for the balance remaining unpaid of the original purchase-money, and secured by said bond and mortgage, and repaid to Joseph S. the \$1,000 of purchase-money paid down on the purchase by the said Joseph S. to the said Minott Mitchell. This is the conclusion that would be naturally drawn by the simple inspection of the records. The reconveyance of the land would be presumed to be in discharge and satisfaction of the mortgage, inasmuch as it did not appear that said mortgage had ever been assigned, no assignment of it appearing upon the records. The legal and equitable title therein appears to be united in Minott Mitchell. The mortgage, I think, from these facts, would be presumed to be merged in the legal title and thus extinguished. Such I think, would be the natural inference and language of the records, and the interpretation which would ordinarily be put upon the facts therein and thereby disclosed."

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It will be seen, from the statement of the learned judge, that he has assumed, as a fact shown by the records, that the conveyance from Joseph to Minott Mitchell was recorded when Huntington made his purchase and took his title. In that he was mistaken. It appears by the findings of the referee, and the fact is conceded by the learned justice, "that on the 10th day of July, 1858, the said Joseph S. Mitchell conveyed by deed to said Minott Mitchell the premises described in the mortgage above mentioned." It is then further found by him that this deed was recorded on the 6th day of October, 1859, and that finding is supported by the production of the deed in evidence by the defendant; and it also appears by such findings, that on the 3d day of October, 1859, Minott Mitchell sold and conveyed the said mortgaged premises to the defendant, Calvin Huntington, by deed with covenant of warranty; and it is shown by the deed, also read in evidence by the defendant, that the deed was dated and acknowledged on the said 3d day of October, 1859, and was recorded in the book of deeds on the 9th day of January, 1862.

It thus appears that the records, instead of showing the deed from Joseph to Minott Mitchell to have been recorded on the *third* day of October, 1859 (the day on which Huntington took his deed), as assumed by the learned justice in his opinion, did, in fact, show that it was not recorded until the 6th day of October, 1859. The whole of the reasoning and argument, as well as the conclusion based on that assumption, must fall, when the foundation on which they rest is swept away.

It may, however, be urged that if Huntington had actual knowledge or notice of the existence of the deed from Joseph to Minott Mitchell, it is better than the constructive notice with which he would have been chargeable from its record. Conceding that proposition to be true, it does not aid him. There is nothing to show that he had actual knowledge or notice. The fact is not found by the referee. The fair inference deducible from his finding in connection with the evidence is to the contrary. All that is found by him, as to the actual knowledge or notice he had of the title, is that derived from Minott Mitchell, "by whom he was informed that there were no incumbrances, and that the title was good, on which declarations of his vendor the said Calvin relied and believed the same to be true;" and he, on his own direct examination, testified, on being asked what representations were made by Minott Mitchell

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at the time he bought the property, said: "I asked him if he knew the property to be free from incumbrances, and the title good; he said it was; when he handed me the deed, he said the title was as good as if it came from Uncle Sam. He said he had loaned money on the property about the year 1835; he foreclosed the mortgage, and got a chancery deed some several years after; I think in 1844. He gave me the master's deed; he said he had owned it since then; I never had any intimation, in any way, that there was any incumbrance on the property; I was in negotiation with him two or three weeks; I talked about buying it; I asked if the property was free from incumbrances, and the title good, and he said it was;" and on being cross-examined, he, after the statement of some collateral matters, but without having said any thing further in reference to the purchase than is above set forth, said: "I have said all that I recollect in relation to the purchase," and nothing else was afterward stated by him on that subject.

The information conveyed by that statement was, that the title he had was under that master's deed, given in 1844, and that he had continued to own it since that time, and nothing was communicated from which it could be understood or in any manner inferred that he had parted with the title to Joseph, and that he had subsequently received a reconveyance thereof from him.

There is, therefore, nothing to warrant the conclusion from any of the facts actually known to Huntington, or of which he had constructive notice from the records, that the mortgage was merged in the legal title and satisfied.

It may be proper to consider the case in another aspect. Assuming that Minott Mitchell might, in the absence of actual notice of the assignment, be considered and treated as the owner and holder of the mortgage, and that the deed from him, as was suggested on the argument, would operate as an assignment thereof to Huntington (but which I by no means admit, and is contrary to what is said in *Wilson v. Troup*, 2 Cow. 230, etc., by WOODWORTH, J.), the title of the plaintiff would, nevertheless, be superior to his. The deed was recorded in the book of *deeds*. That record was inoperative and ineffectual as the record of an assignment of the mortgage, and conferred no rights as such on Huntington, as assignee. See 1 R. S. 756, §§ 2, 3, etc.; *Gilligg v. Maas*, *supra*, 213, 214; *Dey v. Dunham*, 2 Johns. Ch. 188; *Dunham v. Dey*, S. C., in error, 15 Johns. 155; *James v. Johnson & Morey*, 6 Johns. Ch. 417, 432

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James v. Morey, S. C., in error, 2 Cow., particularly opinions of SAVAGE, C. J. 316; *White v. Moore*, 1 Paige Ch. 551, etc.; *N. Y. Life Ins. and Trust Company v. White*, 17 N. Y. 469; *Brown v. Dean*, 3 Wend. 208.

Each of the parties, on that state of facts, would have held an unrecorded assignment, and that first given would prevail and have preference.

If the views above expressed are correct, the order of the general term is erroneous, and should be reversed with costs, and that of the special term must be affirmed with costs.

SUTHERLAND, J. (after stating the facts). The question, and the only question, in this case is, did Benjamin H. Purdy's mortgage become void, and he lose his mortgage security and lien, by neglecting to have his assignment recorded until after Calvin Huntington's deed had been recorded?

The question I have stated, as the only question in the case, is really nothing more, or other, than a question as to the construction of certain portions or provisions of the recording act (1 R. S. 755 to 763); and all questions of good faith, of notice, etc., which have been, or may be, discussed or adverted to in this case, as incidental to the main question of construction, or otherwise, must come by or from the recording act. Independent of the recording act, it would be wholly immaterial whether Huntington had or had not notice of Purdy's mortgage, or whether Minott Mitchell's deed to Huntington was voluntary, or for a valuable consideration.

Is this not too plain to require an illustration? A. sells and conveys land to B. B. gives back a bond and mortgage for the purchase-money. A. sells and assigns the bond and mortgage to C., and afterward receives a conveyance of the equity of redemption from B., and then by a full covenant deed conveys the land and all his estate and interest in the land to D.

Now, the conveyances, and the bond and mortgage, and their assignment, being left to their common-law force and effect, does not D., irrespective of any recording act, necessarily take his conveyance subject to C.'s mortgage? Could A. convey to D. any more than the equity of redemption? Could his conveyance to D. impair, or in any way affect, C.'s mortgage debt or mortgage security? Or is there, or can there be, independent of the recording act, as between C. and D., any material question of good faith, or of notice,

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or even as to the consideration of D.'s conveyance? Is it, or can it be, at all material as between C. and D., irrespective of the recording act, whether D. did or did not pay a valuable consideration for his conveyance, or whether he had or had not notice of C.'s mortgage? Of course not. It is almost absurd to state these questions; and certainly their statement furnishes their answers.

Nay, further, no ingenious use of words, or plausible suppositions, or imperfect and deceptive analogies, can show, with the recording act in full force and in view, that A.'s conveyance to D. did or could, in fact, *of itself or by itself*, carry or convey any thing but the equity of redemption, for he, in fact, had nothing else to convey; and it is even beyond legislative power, however omnipotent, to enable a person to actually convey that which he has not. And, of course, A.'s deed to D. did not and could not, of itself or by itself, *as the act or deed of A. merely*, with or without the recording act, operate as an assignment of C.'s bond or mortgage, his mortgage debt or mortgage security, lien or interest in the land.

Nay, still further, courts of law, as well as courts of equity, have for a long time viewed a mortgage, before foreclosure, as a mere security for the payment of the debt, and as only a chattel interest; the debt as the principal, and the mortgage and mortgage interest on the land as the mere incident or accessory. An assignment of the principal, the debt, carries with it the mortgage, the incident. The mortgage interest before foreclosure is assets in the hands of executors and administrators. The mortgage interest, before foreclosure, is not the subject of sale on execution at law. *Jackson v. Willard*, 4 Johns. 41; *Blanchard v. Colburn and ux.*, 16 Mass. 346.

In *Jackson v. Bronson*, 19 Johns. 325, it was held that the mortgagor in fee could maintain ejectment against the grantee by deed in fee-simple of the mortgagee.

In *Wilson v. Troup*, 2 Cowen, 195, it was held that the mortgagee, though he had conveyed the whole mortgaged premises with warranty in fee, could yet foreclose, for the reason that this conveyance of the land did not pass his interest in the mortgage; that a mortgage is the mere incident of the debt, and that an assignment of the mortgage interest in the land, without the debt, is a nullity. See, also, *Jackson v. Blodgett*, 5 Cowen, 206, 207.

In *Jackson v. Willard*, 4 Johns., before cited, C. J. KENT said that "the mortgage interest, as distinct from the debt, is not a fit subject of assignment;" that "it would be absurd in principle and

oppressive in practice for the debt and mortgage to be separated and placed in different hands." In his commentaries, 4 Com. 194, 5th ed., he says: "The assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered to be without meaning or use. This is the general language of courts of law, as well as courts of equity; and the common sense of parties, the spirit of the mortgage contract, and the reason and policy of the thing, would seem to be with the doctrine."

The cases of *Jackson v. Bowen*, 7 Cow. 13, 20; *Robinson v. Ryan*, 25 N. Y. 320, cited by Justice DANIELS in his opinion on a former argument of this case, are not inconsistent with this doctrine, because the decisions of those cases proceeded on the theory that the irregular foreclosure proceedings, etc., operated as an assignment of the mortgagee's debt and interest in the land, both. The head note in *Jackson v. Bowen*, says: "A conveyance by a mortgagee, as upon a statute foreclosure, under the power of sale in his mortgage, even if the proceedings to foreclose be irregular, yet carries all his interest as mortgagee to the purchaser, *as well in the debt as in the land.*"

The whole drift of the argument of Mr. Justice DANIELS in his opinion, and of the argument of the counsel for the respondent, is, to show, that, with the aid of the recording act, Minott Mitchell's deed to the respondent made him an assignee of Purdy's mortgage interest in the land, as distinct from Purdy's mortgage debt. It is not claimed or pretended, nor could it be, even with the aid of the recording act, that Purdy lost his mortgage debt by neglecting to have his assignment recorded; that *it* was either extinguished by the act, or otherwise transferred to the respondent.

Now, having shown at length, perhaps inexcusably so, that Minott Mitchell's deed to Huntington did not and could not, as his act and deed merely, without the aid of the recording act, make the respondent an assignee of Purdy's mortgage interest in the land, for two reasons, 1st, because he could not convey that which he had not; and, 2d, because the law would not have permitted him, if he had had Purdy's mortgage interest in the land, effectually to assign it as distinct and separate from the mortgage debt,—let us now turn to the recording act.

How does *it* operate as a protection or in aid of the subsequent purchaser, grantee, mortgagee or assignee, in good faith, for a valuable consideration, whose deed, mortgage or assignment is first

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recorded? By avoiding the prior deed, mortgage or assignment, the recording of which has been neglected, as to such subsequent purchaser, etc. As to such subsequent purchaser, etc., whose deed, etc., has been first recorded, the *act* in effect transfers the estate or interest covered and actually conveyed by and held under such first unrecorded deed, mortgages, etc., *as of the time of the execution of his deed, mortgages, etc.*

If the act requires an assignment of a recorded mortgage to be recorded, as against a subsequent grantee, in good faith and for a valuable consideration, of the equity of redemption, whose conveyance shall first be recorded, then there is an end of this case in favor of the respondent. If it does not, but only requires such assignment to be recorded as against a subsequent assignee, in good faith and for a valuable consideration, of the mortgage, whose assignment shall first be recorded, then there is an end of the case in favor of the appellant.

I do not question the power of the legislature by the recording act to separate the mortgage interest in the land, and transfer it to the subsequent assignee as a distinct thing from the mortgage debt, leaving the debt, as evidenced by the bond or other instrument, in the hands of the first assignee, to be enforced as he may be able to enforce it without the mortgage security.

Now, I think I have shown, but perhaps with inexcusable elaborateness, that the question whether Benjamin H. Purdy lost his mortgage lien and security, by neglecting to have his assignment recorded, is and must be entirely a question under the recording act, and that its decision wholly depends upon the decision of the question of construction, whether the act required him to record his assignment of the recorded mortgage as against Huntington the subsequent grantee of Purdy's assignor, who had, in fact, and could convey, nothing more than the equity of redemption.

This question of construction was decided by this court in *Campbell v. Vedder*, 3 Keyes, 174, and I think rightly decided, in favor of the prior assignee of the recorded mortgage.

I do not think that the report of this case justifies Justice DANIELS' remark or suggestion in his opinion in this case on a former argument, that this question of construction was not in *Campbell v. Vedder*. Certainly the question, whether the recording act required the assignee of a recorded mortgage, to have his assign

ment recorded as against a subsequent mortgage in good faith, was in the case and decided.

It does not follow, because a court might have decided a case upon either of two or more grounds, that its decision is not authoritative on the ground it was decided.

This question of construction was not in *Kellogg v. Smith*, 26 N. Y. 18, because there the question was between two assignees of the bond and mortgage. That case was decided on the ground that the second assignee was not an assignee in good faith; that the non-production of the bond and mortgage by his assignor, charged him with notice of the first and prior assignment, and of the delivery of the bond and mortgage to the first assignee.

This decision assumed that the assignee of a mortgage, whether recorded or not, is required by the act to have his assignment recorded, as against a subsequent assignee, in good faith and for a valuable consideration, of the same mortgage, whose assignment was first recorded; otherwise the question of good faith would not have been a material question in the case.

This was expressly decided in *Vanderkemp v. Shelton*, 11 Paige, 28. It was also assumed by Justice ALLEN in his dissenting opinion in *Kellogg v. Smith*, and by Justice PECKHAM in his opinion in *Campbell v. Vedder*; and I think it plainly follows from §§ 1, 37 and 38 of the recording act.

The ingenuity and unsoundness of the argument of the counsel for the respondent in this case consists mainly in this; that he starts by supposing that the respondent looked at the records, and saw the deeds and mortgages that were recorded, and then he tries, with the aid of the recording act, to make the respondent a subsequent assignee of the mortgage interest in the land, distinct from the mortgage debt, and thus put him in a position in which he can claim the protection of the recording act; whereas, in fact, the respondent did not look at the records, or know any thing about them; and, if he had searched the records and found the deeds and mortgages that were recorded, before he can invoke the protection of the act, or give any materiality to the question of fact or good faith, he must first, without any aid from the act, put himself in a position to claim its protection; that is, show that he is a subsequent assignor of the mortgage, or of the mortgage interest in the lands.

It is absurd to say, or to think, if the respondent had searched

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the records and found the deeds and mortgage that were recorded, and had supposed from them that the mortgage, or mortgage interest in the lands, had been merged, that such inspection of the records and knowledge of the recorded deeds and mortgage, and erroneous supposition, could or would at all have affected the operation of Minott Mitchell's deed to him, or tended to show, that, by that deed, he became the assignee of Benjamin H. Purdy's mortgage, or mortgage interest in the land.

I think the judgment of the special term was clearly right, and that the order of the general term reversing it should be reversed.

GROVER, J., dissented.

Order reversed.

LOOP, admr., appellant, v. LITCHFIELD.

(43 N. Y. 351.)

Negligence — defective machinery sold for use.

A balance-wheel, already made and in hand, having defects which weakened it, was sold by the defendant to a person who bought it for his own use. The defects in the wheel were pointed out to the purchaser, and fully understood by him. The wheel was used by the buyer for some years, and was then taken into the possession of the plaintiff's intestate, who used it for his own purposes. While so in use, it flew apart by reason of its original defects, and the plaintiff's intestate was killed. *Held*, that the seller was not guilty of such negligence as would make him liable in an action for causing the death of the plaintiff's intestate.

This was an action brought under the statute (Laws 1847, ch. 450) for causing the death of plaintiff's intestate by negligence. The defendants manufactured cast-iron fly-wheels; one Collister brought them a circular saw, frame and arbor, to have a wheel put on it suitable for use in sawing cord-wood. They pointed out several wheels to him as suitable for the purpose. He selected one from the number, which was lighter and cheaper than the others. It had a visible sag or flaw in the side of the rim, which defendants thought they could fix up. They fixed it up by filling the flaw with lead, and boring a quarter-inch hole transversely through the sound iron remaining at the center of the flaw, in which hole they inserted a rivet

to hold the lead in its place, and then painted the wheel a dark color, so that it looked perfectly sound. The evidence tended to show that the wheel could be used safely with the flaw alone, but that the boring injured it and rendered it unsafe. The defendants told Collister what they had done, but the extent to which the wheel had been weakened could not appear by any outside examination. The defendants expressed their opinion that the wheel was suitable for Collister's purposes, and put it upon the machine and sold it to be used thereon in sawing wood with a horse-power. That sale was made in 1862; the machine was used very little in the spring and fall, and at other times lay idle. In 1864 Collister put upon it a saw belonging to one Loop, a neighbor, and gave Loop the privilege of using the machine. Loop used it occasionally during the next two winters, and during the remainder of the time it was idle. In October, 1866, while using it carefully for the purposes for which it was made and sold, upon the machine on which the defendants had placed it, and with which they sold it to be used, the wheel burst by reason of the defects, and killed Loop. The evidence was conflicting as to whether or not plaintiff's intestate knew of the defect in the wheel at the time he took it.

Under the charge of the court, which is sufficiently set forth in the opinion, the jury returned a verdict for the plaintiff. The general term of the supreme court reversed the judgment, and ordered a new trial, and the plaintiff brought this appeal.

Edward C. James, for appellant.

William H. Sawyer, for respondent.

HUNT, J. A piece of machinery already made and on hand, having defects which weaken it, is sold by the manufacturer to one who buys it for his own use. The defects are pointed out to the purchaser and are fully understood by him. This piece of machinery is used by the buyer for five years, and is then taken into the possession of a neighbor, who uses it for his own purposes. While so in use, it flies apart by reason of its original defects, and the person using it is killed. Is the seller, upon this state of facts, liable to the representatives of the deceased party? I omit, at this stage of the inquiry, the elements, that the deceased had no authority to use the machine; that he knew of the defects, and that he did not

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exercise proper care in the management of the machine. Under the circumstances I have stated, does a liability exist, supposing that the use was careful, and that it was by permission of the owner of the machine?

To maintain this liability, the appellants rely upon the case of *Thomas v. Winchester*, 6 N. Y. (2 Seld.) 397. In that case, the defendant was engaged in the manufacture and sale of vegetable extracts for medicinal purposes. The extracts were put up in jars with appropriate labels. The defendant sold the articles to Mr. Aspinwall, a druggist of New York. Aspinwall sold to Dr. Ford, a physician and druggist of Cazenovia, where the plaintiff resided. Mrs. Thomas, one of the plaintiffs, being ill, her physician prescribed for her a dose of the extract of dandelion, which is a simple and harmless medicine. The article furnished by Dr. Ford, in response to this prescription, was the extract of belladonna, a deadly poison. The jar from which this medicine was taken was labeled, "*½ lb. dandelion, prepared by A. Gilbert, 108 John St., N. Y., Jar 8 oz.,*" and, thus labeled, was sold to Dr. Ford. He relied upon the label, believed the medicine to be dandelion, and sold and delivered it to the plaintiffs as such. Mrs. Thomas suffered a severe illness by reason of this mistake. It was conceded by the counsel in that case, and held by the court, that there was no privity of contract between Winchester and Thomas, and that there could be no recovery upon that ground. The court illustrate the argument by the case of a wagon built by A., who sells it to B., who hires it to C., who, in consequence of negligence in the building, is overturned and injured. C. cannot recover against A., the builder. It is added: "Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence, and such negligence is not an act imminently dangerous to human life." So, if a horse, defectively shod, is hired to another, and, by reason of the negligent shoeing, the horse stumbles, the rider is thrown and injured, no action lies against the smith. In these and numerous other cases put in the books, the answer to the action is, that there is no contract with the party injured, and no duty arising to him by the party guilty of negligence. "But," the learned judge says, "the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death, or great bodily harm, of some person, was the natural, and almost inevitable, consequence of the

sale of belladonna by means of the false label." "The defendant's neglect puts human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution?"

The appellants recognize the principle of this decision, and seek to bring their case within it, by asserting that the fly-wheel in question was a dangerous instrument. Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle, or the like. They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are, essentially, and in their elements, instruments of danger. Not so, however, an iron wheel, a few feet in diameter and a few inches in thickness, although one part may be weaker than another. If the article is abused by too long use, or by applying too much weight or speed, an injury may occur, as it may from an ordinary carriage wheel, a wagon axle, or the common chair in which we sit. There is scarcely an object in art or nature from which an injury may not occur under such circumstances. Yet they are not in their nature sources of danger, nor can they, with any regard to the accurate use of language, be called dangerous instruments. That an injury actually occurred by the breaking of a carriage axle, the failure of the carriage body, the falling to pieces of a chair or sofa, or the bursting of a fly-wheel, does not in the least alter its character.

It is suggested that it is no more dangerous or illegal to label a deadly poison as a harmless medicine than to conceal a defect in a machine and paint it over so that it will appear sound. Waiving the point that there was no concealment, but the defect was fully explained to the purchaser, I answer, that the decision in *Thomas v. Winchester* was based upon the idea that the negligent sale of poisons is, both at common law and by statute, an indictable offense. If the act in that case had been done by the defendant instead of his agent, and the death of Mrs. Thomas had ensued, the defendant would have been guilty of manslaughter, as held by the court. The injury in that case was a natural result of the act. It was just what was to have been expected from putting falsely labeled poisons in the market, to be used by whoever should need the true articles. It was in its nature an act imminently dangerous to the lives of others. Not so here. The bursting of the wheel and the injury to human life was not the natural result or the expected consequence

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of the manufacture and sale of the wheel. Every use of the counterfeit medicines would be necessarily injurious, while this wheel was in fact used with safety for five years.

It is said that the verdict of the jury established the fact that this wheel was a dangerous instrument. I do not see how this can be, when there is no such allegation in the complaint, and no such question was submitted to the jury. "The court stated to the counsel that the only question on which they would go to the jury would be that of negligence; whether, in the manufacture and sale of this article, the defendants are guilty of negligence, which negligence produced the injury complained of." If the action had been for negligence in constructing a carriage, sold by the defendants to Collister, by him lent to the deceased, which had broken down, through the negligence of its construction, it might have been contended, with the same propriety, that the finding of those facts by the jury established that a carriage was a dangerous instrument, and thereby the liability of the defendants became fixed. The jury found simply that there was negligence in the construction of the wheel, and that the injury resulted therefrom. It is quite illogical to deduce from this, the conclusion that the wheel was itself a dangerous instrument.

Upon the facts as stated, assuming that the deceased had no knowledge of the defects complained of, and assuming that he was in the rightful and lawful use of the machine, I am of the opinion that the verdict cannot be sustained. The facts constitute no cause of action.

The case contains the element, that the deceased was himself personally aware of the defects complained of. Collister testifies that he pointed them out to him, and conferred with him in relation to their effect. Instead of submitting this question of knowledge to the jury, the judge charged, "that if they find from the evidence that the defendants made this defective wheel for use, and that it broke by reason of the defect, the defendants are liable for the defect to whoever used it." To which the defendants excepted.

The question is also presented of the effect of the circumstance that the deceased was engaged in the use of the machine, without the permission of the owner. Having reached the conclusion that there can be no recovery independent of these difficulties, it would not be profitable to spend time in their discussion. It is only necessary to say, that, in my judgment, they are very important elements

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and that, were the plaintiffs otherwise entitled to recover, they would merit the gravest consideration.

I cannot say that there was error in the charge, on the subject of negligence. It was not submitted with clearness, certainly, nor in the most appreciable form. The question is rather, what care the deceased was bound to exercise, than what negligence would be excused. The charge stated that the "defendants were not exonerated by slight negligence on the part of the deceased, although, if he had used the utmost possible care, the accident would not have happened." This is equivalent to a charge that the deceased was not bound to use the utmost possible care, and is free from objection. The deceased was bound to exercise that care and attention, in and about the business he was engaged in, that prudent, discreet, and sensible men are accustomed to bestow under like circumstances. The utmost possible care is not required. Indeed, its exercise would require an extent of time and caution that would terminate half the business of the world. *Sheridan v. Brooklyn*, 36 N. Y. 43; *Wells v. Long Island*, 32 Barb. 398, affirmed; 34 id. 670; *Button v. Hudson River Co.*, 28 id. 258; *Curran v. Warren Co.*, 36 id. 153; *Milton v. Hudson S. B. Co.*, 37 id. 212; *Owen v. Hudson River Co.*, 35 id. 516.

The order of the general term should be affirmed, and judgment absolute given for the defendants.

Judgment affirmed, and judgment absolute ordered for defendants.

SHAPLEY v. ABBOTT, appellant.

(43 N. Y. 443.)

Statute of limitation — parol promise not to plead — estoppel.

- A parol promise by defendant not to plead the statute of limitation if plaintiff will allow him further time on a claim that is nearly outlawed, does not estop the defendant from setting up the statute in a suit brought upon that claim. Such promise, not being in writing, is not under the code such an acknowledgment of indebtedness as will relieve the note from the operation of the statute of limitation.
- A party may waive the benefit of a statute founded in public policy, by omitting to set up the defense of the statute, but he cannot make a valid promise in advance to waive the benefit of such statute.

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This action was brought in a justice's court upon a promissory note more than six years after the cause of action had accrued. The defendant pleaded the statute of limitation. The plaintiff alleged, and offered evidence to prove, that the defendant had promised not to plead the statute of limitation. The alleged promise was oral. The jury rendered a verdict for the plaintiff. The county court, on appeal, reversed the judgment entered on the verdict, and the supreme court, on appeal, reversed the judgment of the county court. From the judgment of the supreme court the defendant brought the appeal.

Samuel D. White, for the appellant, to the point that section 110 of the Code applied, cited 31 N. Y. 289; 43 Barb. 198; 32 id. 251; 4 Seld. 368; 11 Wheat. 309; and, as to the construction of the English statute, *Dickinson v. Hatfield*, 5 Carr. & P. 45; *Hayden v. Williams*, 7 Bing. 163. That the facts do not constitute a waiver, or an *estoppel in pais*, *Knettle v. Newcomb*, 31 Barb. 169; 22 N. Y. 249; *Crawford v. Lockwood*, 9 How. 547; *Harper v. Leal*, 10 id. 282; *Packard v. Sears*, 6 Adol. & Ell. 469; 2 Smith's Lead. Cas. 511, 531; 3 Hill, 216; *Stedman v. Duhamel*, 1 O. B. (50 E. C. L.) 888; *Warren v. Walker*, 10 Shep. (23 Me.) 453; *Eggleston v. Harlem R. R.*, 35 Barb. 162, 173.

Charles Mason, for the respondent, on the question of estoppel, cited *Gaylord v. Van Loan*, 15 Wend. 308; *Bloodgood v. Utica Ins. Co.*, 4 Wend. 652; *Warren v. Walker*, 10 Shep. 453; *Wilber v. Pres. of Williams Coll.*, 23 Pick. 302; *Brookman v. Metcalf*, 4 Rob. 568; *Strong v. Ellsworth*, 26 Vt. 366; *Kinney v. Farnsworth*, 17 Conn. 355; *Roe v. Jerome*, 18 id. 138; *Dyer v. Cady*, 20 id. 563; *Dezell v. Odell*, 3 Hill, 219; 2 Exch. 653; *Hall v. White*, 3 Carr. & P. 242; *Mordecai v. Oliver*, 3 Hawk. 479; *Trustees v. Williams*, 9 Wend. 147; *Welland Canal v. Hathaway*, 8 id. 483; *Eyro v. Lambly*, 2 Esp. 635; *Ford v. Williams*, 24 N. Y. 359, 365; *Harris v. Merchant*, Curtis C. C. 144; 26 Vt. 373; 30 N. Y. 226; *Bank of Genesee v. Patchin Bank*, 3 Kern. 316; *Mason v. Anthony*, 3 Keyes, 609; *Ferguson v. Hamilton*, 35 Barb. 427; 26 id. 611; 17 How. 569; 4 Barb. 495; 10 Paige, 326; 7 id. 68; *Roberts on Frauds* (2d Am. ed.) 135, 138; *Willard's Eq.* 283; 14 Johns. 15, 35, 86, 1 Johns. Ch. 149; 3 Barb. Ch. 413.

EARL, C. J. The note bears date February 17, 1853. The plaintiff was sworn on the trial, and the following is his evidence, so far as it is material here: "I had a conversation with defendant in the month

of September, 1858; a short time before that I had received a line from defendant, asking me to pay the costs in the Nye matter; they were Abbott & Moore's costs; they defended a suit for me; I came up to his office to see him; he was not there; I then went to his house and found him; I told him I came up to settle the matter of those costs, and offered to pay the balance of them after deducting this note; I told him the note would outlaw soon, and something must be done about it; that I had waited on him for most six years; he told me if the note did outlaw he would not plead the statute of limitations on it; that I might rest assured of it; I told him that I had waited on the settlement of matters nearly six years; I was pressing him to pay the note, and told him when he did I would pay the Nye matter; this was the only note I had against defendant at the time; defendant refused to apply the note in payment of the Nye costs, because, he said, the costs were Abbott & Moore's, and the note was his individual matter; if defendant had not made this promise or agreement not to plead the statute I should not have let this note run more than six years without suing it; I should have sued it within six years after its maturity if it had not been for that agreement; I let the note outlaw because of defendant's agreement." The defendant was also sworn, and positively denied the agreement not to plead the statute, and yet, for the purpose of this appeal, the facts testified to by the plaintiff must be taken as true. The only question for us to consider is, whether these facts were sufficient to save this note from the statute of limitations.

Prior to the code, what took place between the parties in September, 1858, would have been sufficient to take the note out of the operation of the statute of limitations. It would only have been necessary for the plaintiff to show an unconditional acknowledgment of the existence of the debt; and this could have been shown by proof of a direct acknowledgment, or by proof of facts from which it could be properly inferred. Angell on Lim. § 208, etc.; *Dean v. Hewit*, 5 Wend. 257; *McCrea v. Purmort*, 16 id. 460, 477; *Henry v. Root*, 33 N. Y. 526; *Cocks v. Weeks*, 7 Hill, 45; 1 Greenl. Ev. § 197. In the case of *McCrea v. Purmort*, COWEN, J., says: "The admission of a debt is available to take it out of the statute of limitations, whether that admission be express or tacit, and it may be implied from the conduct of the party." Here the plaintiff went to the defendant with this note, in substance claiming the whole of it to be due, and requested him to allow the amount of

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it upon the bill of Abbott & Moore's costs. The defendant refused thus to allow it, not in any way denying his liability upon it, not upon the ground that the amount of it was not due as claimed, but upon the sole ground that the costs belonged to him and Moore jointly, while the note was his individual debt; and when plaintiff pressed him to arrange the note as suggested, on the ground that it would soon outlaw, instead of denying his liability in any way, he said to the plaintiff that he might rest assured that he would not plead the statute of limitations if it did outlaw. It seems to me that this language, without anything to qualify it or weaken its force, furnishes very conclusive proof of an acknowledgment of the debt. When the holder of a note presents it to the maker and requests payment, upon the ground that it is about to outlaw, and the maker, without in any way denying his liability, says that he will not plead the statute of limitations if it should be permitted to run, I think such a declaration is, under the circumstances, of itself sufficient evidence of an acknowledgment of the debt within the cases decided before the code to take the note out of the statute. It was so held in *Burton v. Stevens*, 24 Vt. 131.

The acknowledgment, then, proved in this case, would have been sufficient to take this note out of the statute of limitations, if it had not been for section 110 of the code, which provides that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby." The only effect of this section is, to require that to be proved by writing which could before be proved by parol. *Hayden v. Williams*, 7 Bing. 163. Hence, if the plaintiff relied upon what the defendant said in September, 1858, as an acknowledgement to take the note out of the statute, he would fail, simply because it was not in writing. If he relied upon what the defendant then said, as an agreement not to plead the statute, he would fail, if for no other reason, because there was no consideration for the agreement. He did not agree with the defendant that he would wait and permit the note to outlaw. Neither could he rely upon what then took place as a waiver by the defendant of the statute of limitations, because there was no consideration to uphold the waiver. The defendant did not then have the right to plead the statute, and this was, at most, a mere promise to waive it. *Crawford v. Lockwood*, 9 How. 547. The only ground, therefore, the plaintiff

has to stand on, is, that the defendant is estopped, by what he said, from pleading and availing himself of the statute; and whether the doctrine of equitable *estoppel in pais* is applicable to a case of this kind, under the law as it now is, is the only question in this case remaining to be considered.

Now, what is an equitable *estoppel in pais*, as generally understood and applied in the courts? It is used to preclude a party from maintaining, by evidence, that which he has before expressly or tacitly denied, or disproving that which he has before expressly or tacitly admitted, when the other party has acted upon the faith of the admission or denial in such a manner that he will be injured unless the same is held conclusive. It is said by Justice SELDEN, in *Crawford v. Lockwood*, "that it is essential to every *estoppel in pais* that it relate to some matter of fact which has been previously either admitted or denied by the party claimed to be estopped. An admission by a person as to the law, or as to the legal effect of his contract, is never held to estop him. It is also necessary, that the fact should be one of which the party claiming the benefit of the estoppel was ignorant. The basis of an *estoppel in pais* is fraud. It is not, it is true, essential that there should have been an intention to deceive. But there must have been a confidence reposed, which would be betrayed to the injury of one party if the other is permitted to retract his admission or denial." In *Knettle v. Newcomb*, 31 Barb. 169, Justice PRATT, speaking of *estoppel in pais*, says: "The defense is not available, for the reason that both sides were aware of all the facts." In *Hutchins v. Hibbard*, 34 N. Y. 24, it is held, that an *estoppel in pais* does not arise from the mere omission to give special notice of an equity to one already aware of its existence. In *Dyer v. Cady*, 20 Conn. 563, HINMAN, J., says: "The rule on this subject, which the court has repeatedly sanctioned, is that when one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act in that belief, so as to alter his own previous position, the former is precluded from averring, as against the latter, a different state of things as existing at the same time." In *Roe v. Jerome*, 18 Conn., the defendant had represented that a certain bill of exchange was good business paper; and it was held that he could not be permitted to deny that, as against a person who had received it upon the credit of such assertion. And it is said in reference to this, that "whoever, by his words or conduct, causes another to believe in the exist-

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ence of a certain state of things, and thus induces him to act on that belief, so as injuriously to affect his previous position, he is concluded from averring a different state of things as existing at the time. And even if a party negligently and silently stands by and allows another to contract, on the faith and understanding of a fact which he can contradict, he cannot afterward contradict that fact, as against that person who may be injured thereby." In *Packard v. Sears*, 6 Adol. & Ellis, 475, the plaintiff's property was in the possession of an execution debtor, and he stood by consulting with the execution creditor, making no claim whatever to the property, while the officer sold it to the defendant. It was held that he could not recover against the defendant in an action of trover, on the ground that he had authorized the sale. The court say: "When one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In *Dezell v. Odell*, 3 Hill, 215, an officer had levied upon property and had delivered it to a receiptor, and it was held that the receiptor was estopped from claiming title to the property. It was said by COWEN, J.: "We then have a clear case of an admission by the defendant, intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This I understand to be the very definition of an *estoppel in pais*."

I have cited these cases from a great many, simply to show the language used, with great uniformity, by the courts in reference to *estoppels in pais*. With the exception of a few cases, which I will soon notice, my attention has been called to cases only where this doctrine was applied to conclude parties who had expressly or impliedly admitted or denied certain facts; and to no cases where a party had only promised something for the future, when the facts were equally known to both parties. In this case the fact that the note would outlaw was equally known to both parties. The plaintiff did not rely upon the statement of any fact made by the defendant, but he relied upon the promises of the defendant, which the latter saw fit to break. If a creditor should present his claim to his debtor, not knowing precisely when it fell due, and when it would be outlawed, but believing that it was about to outlaw, and the

debtor, professing to know when it fell due and when it would outlaw, should represent that it had a month longer to run, and request the creditor to delay, and the creditor should thereupon delay the month, when in fact the claim had but one week to run, the debtor would be concluded by the statement he had made, and would be estopped from claiming that the claim was outlawed before the expiration of the month. Here would be the representation of a fact upon which the creditor, not knowing the truth, relied. As another illustration of the rule, as I claim it to be: suppose I meet the maker of a note which I hold, and we both know that it is about to outlaw, and I request him to give a written acknowledgment, renewing it, and to leave it with my banker, and he promises to do so; I afterward see him, before the note is outlawed, and he says he has done so, and I, relying upon this, permit the statute to run. But it turns out that he did not leave the written acknowledgment. Here again would be the representation of a fact; and in a suit upon the note the maker would be concluded by his representation, upon which I relied, and would be estopped from denying a written acknowledgment.

Our attention has been called to the cases where it has been held that a party may be prevented by estoppel from availing himself of the defense of usury. *Ferguson v. Hamilton*, 35 Barb. 427; *Chamberlain v. Townsend*, 26 id. 611; *The Merchants' Bank of Brooklyn v. Townsend*, 17 How. Pr. 569; *Mason v. Anthony*, 3 Keyes, 609. In all these cases there was the representation of a fact, to wit, that there was no usury, to a party ignorant of the truth and who relied upon the representation. But suppose the representation had been made to a party who knew of the usury, or suppose there had simply been a promise not to plead usury, would the courts have held that there was an estoppel?

In the cases of *Crawford v. Lockwood*, 9 How. Pr. 547, *Knettle v. Newcomb*, 31 Barb. 169, and same case, 22 N. Y. 249, it was held that a waiver, in writing, of the benefit of the statute of exemptions, made at the time the credit was given, did not estop the party from claiming the protection of the statute, although he obtained the credit from the other party by his reliance upon this waiver. In the first two cases, the decisions were placed upon the ground that the doctrine of estoppel did not apply, as there was no representation of a *fact* by the one party which was unknown to the other party, and upon which he relied. In the last case, the decision was

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put upon the broad ground of public policy; and it was held, in substance, that the agreement to waive the benefit of the statute of exemptions could not operate in any way, either as a waiver, or as an agreement, or by way of estoppel, for the reason that it would subvert the policy of the law. The same reason will apply to this case. The policy of the statute, requiring that every promise or acknowledgment to take a case out of the statute shall be in writing, signed by the party to be charged, is to prevent fraud and perjuries. And it is the duty of courts so to administer the law as to uphold this policy. If a parol promise not to plead the statute is to be held operative, either as a waiver, or an agreement, or by way of estoppel, to subvert the statute, then all the mischief, as this case shows, will be let in which it was the policy of the law to shut out.

The statute of frauds requires certain contracts to be in writing. Can a party be deprived of the benefit and protection of this statute by any parol waiver, agreement or estoppel? Suppose a seller of real estate should agree with the purchaser that it need not be reduced to writing, and that he would not plead the statute of frauds; would he be estopped, when sued upon the contract of sale, from setting up the statute as a defense? No case can be found asserting such a doctrine. Courts of equity, not courts of law, will enforce the specific performance of parol contracts for the sale of lands in cases of part performance. Story's Eq. Jur., § 759, *et seq*. But this is not upon the doctrine of estoppel, but upon that of fraud. These courts have jurisdiction of frauds, and, under this acknowledged head of jurisdiction, they take jurisdiction of such cases and administer their equitable relief by compelling performance. If they proceeded upon the doctrine of estoppel, there would be no necessity for part performance, and they could afford relief in every case where the writing was omitted in reliance upon the declarations or promise of the other party, waiving or agreeing not to plead the statute; and if the doctrine of estoppel controlled such cases, payment or part payment would be just as effectual to uphold the estoppel as any other part performance; and courts of law, as well as courts of equity, would uphold such contracts, as the defendant would always come into court estopped from denying that the contract was in writing. I have no doubt that if the buyer of land should have the contract drawn and left with his attorney for the seller to sign, and the latter should represent to him that he had signed it, and on the faith of this the buyer should pay the pur-

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chase-money, the seller would be estopped from denying that he had signed it, and the contract could be enforced, certainly in equity, and I think in law.

A party may, undoubtedly, without trenching upon public policy, waive the defense of usury, or of the statute of frauds, or of the statute of limitations, by omitting to set up the defense when sued. And he may waive his statute exemption by turning out exempt property when the officer comes with the execution; but no case has occurred to me in which a party can, in advance, make a valid promise that a statute founded in public policy shall be inoperative.

There are a few cases which seem to be in conflict with the conclusion I have reached as to the statute of limitations. In *Warren v. Walker*, 23 Maine, 453, there was, at the bottom of a bill, the following memorandum, signed by the defendant: "I hereby waive all defense which I might otherwise make to the above bill, by law, under and by virtue of any statute of limitations;" and it was held not sufficient, as an acknowledgment of indebtedness, or as an express promise, to take the case out of the operation of the statute of that state; because the statute required that the promise or acknowledgment should be not only in writing, but "an express one;" and here it was only an implied promise.

It was held, however, that this memorandum contained an implied agreement not to set up the statute; and, as there was a *consideration proved for this agreement* (unlike the case we are considering), it was held that the defendant was bound by the agreement. But in *Hodgdon v. Chase*, 29 Maine, 51, it was held that a parol promise, founded upon a valuable consideration, made by the defendant to waive the statute of limitations and take no advantage of the same, would not preclude him from setting up the statute as a defense; and such is the settled law in that state. 32 Maine, 169. In *Webber v. Williams College*, 23 Pick. 302, the treasurer of the college addressed a letter to the plaintiff, in answer to a demand for payment, proposing that if he would forbear bringing his action at that time he should have the same rights for one year more that he then had; the plaintiff, in answer, stated that he would not consent to postpone bringing his action as proposed, but in point of fact he did so postpone it till after the six years. The court held that it was a sufficient compliance with the defendants' offer; that they were bound by it, and that it was a good waiver of the statute of limitations. The decision was not put upon the doctrine of

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estoppel, but seems to have been put upon that of waiver. If the court intended to rest its decision solely upon the latter ground, I cannot assent to it. The letter written by the treasurer was probably, under the circumstances, a sufficient acknowledgment in writing of the debt, to save it from the statute; and upon this ground the decision of the case could, with more propriety, have been placed. In the *Utica Insurance Co. v. Bloodgood*, 4 Wend. 652, the suit was upon a note dated April 28th, 1818. On the 26th of August, 1824, the defendant gives a stipulation, as follows: "Whereas, the Utica Insurance Company hold my note, dated April 28th, 1818, indorsed by C. O. B. for \$1,900; now, therefore, I hereby agree not to plead the statute of limitations in a prosecution for any balance that may be due on said note." SUTHERLAND, J., writing the opinion of the court, says: "The defendant is estopped by his stipulation from availing himself of the statute of limitations." This is all that is said about estoppel. There is no discussion, and no authority is cited. It is clear to my mind, that the learned judge did not use the word estoppel in the technical sense of *estoppel in pais*. All he meant was, that the defendant was deprived of the benefit of the statute by his stipulation. It was wholly unnecessary to resort to the doctrine of *estoppel in pais*, as the stipulation, beyond all question, contained a sufficient acknowledgment of the debt to take it out of the statute. In *Gaylord v. Van Loan*, 15 Wend. 308, the plaintiff held the notes in suit, and other demands, and met the defendant, and claimed of him a large balance due. The defendant denied that he owed the plaintiff any thing; and when informed that the demands must be sued unless renewed, he said that he would not avail himself of the statute, and that a suit need not be brought on that account. On the trial these facts were proved, and the circuit judge charged the jury: "That it was for them to say whether a conditional promise had not been established; whether what was said by the defendant was not tantamount to saying, 'if you prove I owe you any thing, I will pay you;' and instructed them that, if such had been the language of the defendant, it would avoid the statute of limitations, or prevent its being a bar to the plaintiff's recovery." This was all that was said by the judge about the statute of limitations, and nothing was said about estoppel. Upon the argument in the supreme court nothing was said by counsel about estoppel, and the counsel for plaintiff attempted to uphold the verdict upon the very ground taken by the circuit judge.

in his charge; but the court held the charge to be erroneous, and granted a new trial, upon the ground that what the defendant said could not be construed into a new promise or recognition of indebtedness, while he denied all indebtedness, and this was all that was really decided in the case.

Judge NELSON, writing the opinion of the court, says: "Although we cannot, upon any consistent reasoning, infer a new promise to pay the notes from what was said by the defendant, taking the whole together, yet we do not say the plaintiff is entirely remediless;" and then he goes on to discuss the doctrine of *estoppel in pais*, and reaches the conclusion that the defendant might be estopped from claiming the protection of the statute. But all he says in this branch of the opinion is *obiter*. He cites the case of *Utica Insurance Co. v. Bloodgood*. All the other authorities cited are upon the general doctrine of *estoppel in pais*, where it was held that a party was estopped by the admission or denial of a fact upon which another party had acted. While I think this portion of the opinion unsound, it would not be a conclusive authority, if sound, under our present statute. In *Brookman v. Metcalf*, 4 Rob. 568, there was no agreement not to plead the statute, and no waiver of the statute by the defendant. During the pendency of an action upon a promissory note, by the plaintiffs against the maker, the defendant promised that, if they would suspend bringing an action upon another note given by him at the same time, he would abide the decision in the action then pending. The plaintiff omitted to sue the defendant until the other action was finally decided, and then his note against the defendant was outlawed. The defendant set up the statute of limitations, and on the trial denied, as a witness, the alleged promise. The plaintiffs recovered, and, on appeal, the court held, that while defendant's promise was not sufficient, being by parol, to save the note from the statute, yet that the defendant was estopped from availing himself of the statute. While I cannot assent to the doctrine of this case, it is a fair illustration of the mischief that will follow if estoppels, upheld by parol declarations, shall be permitted practically to subvert the statute. Fraud and perjury will be resorted to for the purpose of prolonging the existence of stale demands; and when a party fails to uphold a parol promise, because it is condemned by the statute, he will seek to reap the benefit of it as an estoppel.

I am therefore in favor of reversing the judgment of the general term, and affirming that of the county court, with costs.

SUTHERLAND, J. Assume that the appellant's promise, agreement or statement, whichever you choose to call it, that he would not plead the statute of limitations, might have been regarded as an express promise to pay the debt, or as an acknowledgment of the debt as subsisting, from which a promise to pay might have been implied before the code; or assuming that, had such promise, agreement or statement been in writing, it would have been sufficient evidence of a new or continuing contract, within section 110 of the code; that the respondent cannot use the promise, agreement or statement as an estoppel, or by way of estoppel, is not a sequence of either assumption.

True, the promise could not be actually used both ways in the same case; but what I mean is, that it does not follow that it cannot be used or received as an estoppel, because, had it been in writing, it would, or might have been, sufficient evidence of a new or continuing contract, within section 110 of the code.

But the promise was not in writing, and therefore could not be used by the respondent under section 110 of the code; and the question is, whether it could be used by him by way of estoppel.

I think, clearly not. If it estops the appellant, what does it estop him from? Why, from effectually *pleading* the statute of limitations. Nothing more, or less, or other. Now, one may waive, or lay aside, the protection or benefit which his position gives him the right to claim under a statute; that is, one owing a usurious or outlawed debt may pay it, or he may, I assume, by his conduct or words estop himself from proving that the debt is outlawed, or is usurious; but one cannot estop himself from pleading the statute of limitations, or the statute against usury, or any other public statute. One may lay aside or waive the protection of a statute, but he cannot lay aside or suspend the statute; and to permit one to estop himself from pleading a statute would in effect be permitting him to thwart or suspend the operation of the statute.

Blackstone says (3 Com. 308), that an estoppel may be a special plea in bar, "which happens where a man has done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary." That is, applying what Blackstone says to this case, the plaintiff and respondent might have pleaded in bar of the defendant's plea of the statute of limitations, that he had done some act or executed some deed which estopped him from

effectually pleading the statute; that is, from proving that the statute had attached.

One by his conduct, by act, or words, may estop himself from proving or showing that a different state of things, or of facts, existed than he misrepresented or induced another party to believe existed at the time of his misrepresentation or act.

The defendant's promise or statement in this case, whichever you call it, has none of the elements or features of an estoppel. It is a promise or agreement not to do a thing in the future. Call it a statement, and it cannot be tortured into being an *act* of estoppel, within the meaning of the doctrine of estoppel, or within any authoritative precedents of the application of that doctrine.

The defendant's promise or statement was in words, of course; but it would be absurd to call it a representation or statement of, or as to, any past or then present fact or state of things. There was no representation or deception as to any then existing state of things; indeed, no representation at all; no pretense on the part of the plaintiff of ignorance of any fact known to the defendant.

If the plaintiff has been deceived or injured, he has been deceived and injured by the defendant's pleading the statute of limitations after promising not to do so; that is, by the breach of his promise or agreement; and every one who takes a promise for the payment of money, or to do or not to do a certain thing, expecting the promise to be kept, is liable to be deceived and injured in the same way.

Will it be pretended that a promise not to plead or set up usury, or infancy, or coverture, whether in the note evidencing the debt, or outside of it, would estop or preclude the promisor from effectually pleading and proving the usury, or infancy, or coverture? Nay, further, if the defendant is estopped by his promise not to plead or avail himself of the statute of limitations, why is not the giver of every note for a usurious loan estopped, by the note, from pleading and proving the usurious agreement? Certainly it may be said that the party making the loan and taking the note relied upon the promisor's keeping his promise and paying the note; and certainly the note implies a promise not to plead or take advantage of the law against usury.

The substance of all that has been said by me in this case, if no said by Judge SELDEN, was implied in or follows from what he did say in *Crawford v. Lockwood*, 9 How. Pr. 550, 551; and what-

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ever there be in the opinions in *Gaylord v. Van Loan*, 15 Wend. 308, and *The Utica Ins. Co. v. Bloodgood*, 4 Wend. 652, inconsistent with what was said by Judge SELDEN on this subject of estoppel in *Crawford v. Lockwood*, should be regarded as not good law. See, also, *Knettle v. Newcomb*, 31 Barb. 169.

The affirmance of the judgment in the last cited case (22 N. Y. 249), on the ground upon which a majority of the court affirmed it, was no way inconsistent with the views expressed by Judge SELDEN in *Crawford v. Lockwood*, *supra*, and who was for affirming the judgment in *Knettle v. Newcomb*, for the reasons stated by him in *Crawford v. Lockwood*.

The judgment of the supreme court, reversing the judgment of the county court, should be reversed.

Judgment of supreme court reversed.

THORN v. KNAPP, appellant.

(42 N. Y. 474.)

Breach of promise to marry—damages.

When the defendant in an action for a breach of promise to marry attempts to justify his breach by alleging in his answer, as the cause of his desertion, that the plaintiff has had criminal intercourse with various persons, and fails to prove the allegation, the jury have the right to take this circumstance into consideration in aggravation of the damages to which the plaintiff may be entitled.

ACTION to recover damages for breach of a contract to marry. The defendant alleged, in his answer as a defense, the unchastity of the plaintiff. Under the charge of the court, which is sufficiently set forth in the opinion, the jury rendered a verdict for the plaintiff for the sum of \$4,000. The judgment entered upon this verdict was affirmed, on appeal, by the supreme court at general term, and the defendant appealed to this court.

John Thompson, for appellant.

Homer A. Nelson, for respondent.

EARL, C. J. The defendant, in his answer, alleged that, at the time of the alleged promise of marriage, "the plaintiff was a common prostitute, and still is so, and was then and still is of a bad character, and was and is an unchaste woman, and had and has illicit intercourse with various persons." On the trial the defendant did not attempt to prove any of these allegations; and the court, in the charge to the jury, among other things, charged as follows: "Where a defendant, in his answer, attempts to justify his breach of promise of marriage by stating therein, and thus placing upon the record, as the cause of his desertion of the plaintiff, that she has had criminal intercourse with various persons, and fails to prove it, the jury have a right to take this circumstance into consideration, in aggravation of the damages to which the plaintiff may be entitled." The only question we are called upon to consider, arises upon the exception to this charge.

In *Southard v. Rexford*, 6 Cow. 254, the action was for breach of promise of marriage. The defendant, with the general issue, gave notice that he would prove in his defense that the plaintiff had, at various times and with various persons, specifying them, committed fornication after the alleged promise. He attempted, at the trial, to prove this branch of his defense, but failed. On the question of damages the judge charged: "That in cases of this kind the damages are always in the discretion of the jury; and in fixing the amount they have a right to take into consideration the nature of the defense set up by the defendant; that in his defense he had attempted to excuse his abandonment of the plaintiff on the ground that she was unchaste and had committed fornication with different individuals. But it appeared, from the testimony of his own witnesses, that her character in that respect had not been tarnished, even by the breath of suspicion; that with such a defense on the record, a verdict for nominal or trifling damages might be worse for her reputation than a general verdict for defendant; that, if the defendant had won her affections and promised her marriage, and had not only deserted her without cause, but had also spread this defense upon the record, for the purpose of destroying her character, the jury would be justified in giving exemplary damages." The plaintiff recovered, and the supreme court held this charge to be correct. Judge SUTHERLAND, writing the opinion of the court, says: "Where the defendant attempts to justify his breach of promise of marriage, by stating upon the record, as the cause of his

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desertion of the plaintiff, that she had repeatedly had criminal intercourse with various persons, and fails entirely in proving it, this is a circumstance which ought to aggravate the damages. A verdict for nominal or trifling damages, under such circumstances, would be fatal to the character of the plaintiff; and it would be matter of regret, indeed, if a check upon a license of this description did not exist, in the power of the jury to take it into consideration in aggravation of damages." This case was decided in 1826, and, so far as I can discover, has never been questioned. In Parsons on Contracts, 551, the author says: "If the defendant has undertaken to rest his defense, in whole or in part, on the general bad character or the criminal conduct of the plaintiff, and fail altogether in the proof, it has been distinctly held that the jury may consider this in aggravation of damages," and he refers to the case of *Southard v. Rexford* as his authority.

The case of *Southard v. Rexford* is also cited with approval by Judge INGRAHAM in *Kniffin v. McConnell*, 30 N. Y. 285. That was an action to recover damages for breach of promise of marriage. The defendant, under a general denial, offered, in mitigation of damages, and was allowed to give, some evidence tending to show acts of improper and lewd conduct on the part of the plaintiff, for the purpose of proving criminal intercourse with other men. The presiding judge, among other things, charged the jury, that, if the defendant had attempted to prove plaintiff guilty of misconduct with other men, of which he knew she was not guilty, it aggravated the damages. Judge INGRAHAM, writing the opinion, recognizes and approves the rule laid down in *Southard v. Rexford*. But, while he holds that it is an aggravation of the damages to place such allegations upon the record, he reaches the conclusion that it is not an aggravation of the damages to offer proof of such allegations, when they are not spread upon the record in the answer. A majority of the court, however, differed with him, and held that it was an aggravation of the damages even to offer and attempt the proof of such allegations in mitigation of damages, without setting them up in the answer. It does not appear that any member of the court departed from the doctrine laid down in *Southard v. Rexford*. That case must be regarded as an affirmation of that doctrine, as it cannot be perceived how the offer of the proof can be any more an aggravation of the damages than to put the same matter deliberately in the answer, forever to remain among the records of the court.

Hence, if we rested entirely upon authority, we should be obliged to hold that the charge was right. But the charge can also be sustained upon principle and analogy. The general rule as to actions upon contracts is, that the plaintiff can only recover a compensation for the damages he has sustained by the breach of the defendant, and exemplary or punitive damages are not allowed. To this rule an action for breach of contract of marriage is an exception, and, so far as I can now call to mind, the only exception. As to the measure of damages, this action has always been classed with actions of torts—as libel, slander, seduction, criminal conversation, etc. (*Wells v. Padgett*, 8 Barb. 323; *Johnson v. Jenkins*, 24 N. Y. 252; *Sedgwick on Damages*, 368; *Burns v. Buck*, 1 Lansing, 268); and not without reason. It is the policy of the law to encourage matrimony, and society has an interest in contracts of marriage both before and after they are consummated. A man who enters into a contract of marriage with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman, and also, in a more remote sense, to society, and he needs to be punished in the interest of society, as well as the man who commits a tort under circumstances showing a bad heart. The rule of damages applicable to ordinary contracts would be wholly inadequate; so much depends in each case upon the circumstances surrounding it, and upon the conduct, standing and character of the parties. In all cases where vindictive damages are allowed, it is upon the theory that the defendant's conduct has been such that he deserves to be punished; and with the view of measuring out punishment to him, as well as compensation to the plaintiff, it is always competent to inquire into his motives and intentions; to show that the act complained of was done wantonly, insolently, maliciously, or with a bad and wicked heart. In such actions it is not only proper to show the main transaction, but any facts bearing upon or relating to it, showing that it was done wantonly, maliciously and wickedly, with the view of enhancing the damages. It is upon this theory, that, in an action of slander, the plaintiff is permitted to prove the repetition of the slanderous words subsequent to the time alleged in the complaint, even down to the trial. This proof is allowed, not to sustain the action, and not for the purpose of recovering damages for the words thus repeated, but solely for the purpose of proving the malice which prompted the utterance of the words counted on, and thus bearing upon the damages to be allowed on account of

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them. And so if, instead of repeating the slanderous words orally, they are repeated by being set up as a justification or in mitigation in the answer, and thus placed upon the records of the court, and the defendant fails to prove them, for precisely the same reason and upon the same theory the damages may be enhanced. So, in an action for breach of promise of marriage, it is always competent, for the purpose of enhancing the damages, to prove the motives that actuated the defendant; that he entered into the contract and broke it with bad motives and a wicked heart; and it is competent for him to prove, in mitigation of damages, that his motives were not bad, and that his conduct was neither cruel nor malicious.

In the case of *Johnson v. Jenkins*, 24 N. Y. 252, it was held competent, in mitigation of damages, for the defendant to prove, that, when asked by the plaintiff why he had discontinued his visits to her, he declared that his affection and regard for her were undiminished, but that he could not marry her, because his parents were so violently opposed to the match. Judge ALLEN, writing the opinion of the court, says: "Every circumstance attending the breaking off of the engagement becomes a part of the *res gestæ*. The reasons which were operative and influential with the defendant are material, so far as they can be ascertained; and whether they are such, as tending to show a willingness to trifle with the contract and with the rights of the plaintiff, should enhance the damages, or, on the contrary, showing a motive consistent with any just appreciation of and regard for his duties, should confine the damages within the limit of a just compensation, will always be for the jury to determine." "Had the defendant, by his declarations, shown a wicked mind in the transaction, it is evident that they very properly would have been submitted to the jury further to enhance the damages." Suppose he had told the plaintiff, at any time before the trial of the action, that he had discontinued his visits and broken the contract because she was a prostitute; could she not, upon the same principles, have proved this in enhancement of damages? No damages could be allowed for defaming her by the utterance of these words; but they could be proved as showing the *mind* with which the contract was broken, and as thus bearing upon the damages to be allowed for that. So if this language, instead of being uttered orally, is placed upon the record in the answer, for the same reason and upon precisely the same principle; if the defendant fails to prove it and it thus turns out to be untrue, it may be taken into considera-

tion by the jury in aggravation of the damages. I therefore conclude, upon principle as well as upon authority, that the charge excepted to was free from error, and the judgment should be affirmed.

E. DARWIN SMITH, J. The verdict of the jury establishes the making and breach of the contract of marriage; and, there being no exception to the charge upon the merits, we must assume that the same was, in every respect, proper and satisfactory to the parties, except upon the single point relating to the damages, upon which there was taken a specific exception. The defendant had, in his answer, spread upon the record, as a defense to the action, that the plaintiff, at the time of the making of the said alleged promise of marriage, was, and still was, a common prostitute, and then and still was of bad character, an unchaste woman, and had and has illicit intercourse with various persons. This is a very serious, and, if untrue and unfounded, a most wanton and wicked, charge. And yet, if the defendant had promised to marry the plaintiff, and was, at the time, in entire ignorance of her true character, it was a defense to the action, if proved, and would justify his refusal to perform his contract with her; otherwise, it was simply a matter in mitigation of damages.

The charge appears to have been entirely unproved at the trial, and it does not distinctly appear whether proof of it was or was not attempted; but the defendant would clearly have been entitled to prove it, if he had been able to do so. In the absence of such proof, therefore, of this most injurious and calumnious charge, made upon the record against this plaintiff, the question for the decision of this court is, whether the jury were entitled to consider the fact that such charge had been made, and thus spread upon the record, and whether the judge might properly suggest to them that they had a right to take this circumstance into consideration, in aggravation of the damages to which the plaintiff was entitled. The case of *Southard v. Rexford*, 6 Cowen, is an express authority in favor of the correctness of the charge made by the learned circuit judge. This case was tried by the late Chancellor WALWORTH, then one of the circuit judges, who instructed the jury in a like case, that, in cases of this kind, the damages are always in the discretion of the jury, and, in fixing the amount, they have a right to take into consideration the nature of the defense set up by the defendant; that, in his defense,

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he had sought to excuse his abandonment of the plaintiff, on the ground that she was unchaste; that, with such a defense on the record, a verdict for nominal damages might be worse than a general verdict for the defendant; and that, where such a defense was spread upon the record for the purpose of destroying her character, the jury would be justified in giving exemplary damages." The court in banc, upon a motion for a new trial, affirmed this ruling at the circuit, Judge SUTHERLAND saying: "That where the defendant attempts to justify his breach of his promise of marriage, by stating upon the record, as the cause of his desertion, that she had had criminal intercourse with various persons, and fails entirely in proving it, this is a circumstance which ought to aggravate the damages." This court, also, in *Kniffin v. McConnell*, 30 N. Y. 288, has substantially approved of this case of *Southard v. Rexford*, and affirmed this same rule, in respect to the question of damages in actions of this kind. In this case of *Kniffin v. McConnell*, the allegation of unchastity on the part of the plaintiff was not set up in the answer, and proof of it was not, for that reason, admitted as a defense at the trial; but the proof tending to establish such fact was admitted in mitigation of damages.

The proof having been thus received, the circuit judge, in his charge to the jury, among other things, said to them in respect to such proof, that "if the defendant had come into court and attempted to prove her guilty of misconduct with other men, of which he knew she was not guilty, or when the misconduct was committed with himself, it aggravates the injury and aggravates the claim to damages." That case was tried by me at the circuit, and this charge was made upon the principle that the jury, in such cases, were entitled, when they found the contract of marriage made and broken, to take into consideration all the facts and circumstances of the case, and the conduct of both parties toward each other, and particularly the conduct of the defendant, in his whole intercourse with, and treatment of, the plaintiff, in connection with the making and breach of the contract, and afterward, up to and including the defense and trial of the action; and that, among other facts, it was a legitimate subject for their consideration, if the fact was so, that he not only had abandoned her and trifled with her affections, but had sought to disgrace her and ruin her character. This court virtually adopted the same view of the case. In the opinion of Judge INGRAHAM, who gave the opinion

of the court, he assented to the correctness of the rule on this subject as asserted in *Southard v. Rexford*, and only doubted the correctness of the charge on the ground that the proofs were not given to sustain any allegation upon the record. He says, referring to that case: "The rule is undoubtedly founded upon the fact that the justification is placed upon the record, and that it will ever remain there as a reiteration of the charge against the plaintiff; and with such an answer on the record, a trifling verdict would show that such charge was not unfounded. The same rule applies in actions of libel and slander; but I have not seen any case where the rule has been extended beyond a justification on the record." And, further, he says: "Certainly the rule should be extended no further than the case of *Southard v. Rexford* has carried it, and when it is not made part of the record." Although the proof in that case had been given and received for the benefit and at the instance of the defendant and in mitigation of damages, and against the plaintiff's objection and exception, yet, because there was no allegation on the record to warrant it, the learned judge thought the defendant's exception to the charge relating to such proof a valid one, for the simple reason that the allegation to warrant it was not upon the record. A majority of the court differed with him on that point; but the case, upon the view of the learned judge himself, is entirely in point in favor of the instructions given by the judge, at the circuit, in this case. These cases rest upon the principle, which, I think, is well established in this state: that the action for the breach of the contract of marriage, though in form of an action of assumpsit, is, in fact, and always has been, since it was sustained at common law, in respect to this question of damages, really in the nature of an action for a tort. Damages in this action have never been limited to the simple rule governing actions upon simple contracts for the payment of money. This court asserted a different rule in the case of *Johnson v. Jenkins*, 24 N. Y. 252. In this case, which was an action like this, for a breach of promise to marry, the judge at the circuit had charged that the action was of a class of cases for which the law allows what are called aggravated damages, that is, damages beyond, and in no way measured by, any proof of actual pecuniary loss or injury." Judge ALLEN said, in respect to this charge: "By this I understand that the jury was told, that, in this class of actions, as in libel, slander, seduction, criminal conversation, &c., they are at liberty to give what are termed punitive

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damages, as distinguished from compensatory damages;" and referred to the case of *Hunt v. Byrnet*, 19 N. Y. 173, and to *Keeseler v. Thompson*, therein referred to and affirmed. The learned judge also said, "that damages in this class of cases may be enhanced by such facts and circumstances as aggravated the injury itself, as adding to the indignity and contumely, increasing mental agony, and bringing public disgrace and consequent loss of reputation upon the injured party." This rule clearly covers and justifies the charge given in this case. I think the charge entirely correct, and that the judgment below should be affirmed.

Judgment affirmed.

SHELDON v. SHERMAN and ano., appellants.

(43 N. Y. 484.)

Liability of owner of property driven by flood upon the land of another.

The owner of property which, without his fault or negligence, is carried by high water down a stream and deposited upon the lands of another, will not be liable for any damage occasioned by it, unless he reclaim it, in which event he must make good the damages done.

ACTION for damages occasioned as follows: The defendant's logs were carried by a flood of high water, without his fault, down a river, and deposited upon plaintiff's land, where they remained for about six months. They were then removed by one Pond, who, representing himself to be the authorized agent of the defendants, agreed with the plaintiff on the amount of damage to be paid by defendants. The only relation between Pond and defendants was a contract that the former should take the logs as they lay, pay the land damages, saw them into lumber, and deliver the lumber to the defendants at a stated price. The plaintiff was not aware of this contract; nor were the defendants aware that Pond had represented himself as their agent until after they received the lumber. At the trial judgment was entered for the plaintiff, which was affirmed by

the supreme court at general term on appeal, and this appeal was brought by defendants.

Stephen Brown, for appellant.

Edward F. Bullard, for respondent.

HUNT, J. There is a large class of cases, in which injury is suffered by a party, where the law gives no redress. If a tree growing upon the land of one is blown down upon the premises of another, and in its fall injures his shrubbery, or his house, or his person, he has no redress against him upon whose land the tree grew. If one builds a dam of such strength that it will give protection against all ordinary floods, the occurrence of an extraordinary flood by which it is carried away, and its remains are lodged upon the premises of the owner below, or by means whereof the dam below is carried away, or the mill building is destroyed, gives no claim against the builder of the dam. If the house of A. accidentally take fire, and the flames spread and consume the house of B., the latter has no claim of indemnity upon A. If the horses of A., being properly equipped and driven, become unmanageable, without fault or negligence, run away and injure the property or the person of his neighbor, the latter must suffer the loss. In these cases the injury arises from a fortuitous occurrence beyond the control of man. It is termed "the act of God." The party through whom it occurs is not responsible for it. The party suffering must submit to it as a providential dispensation. *Ryan v. N. Y. Cen. R. R. Co.*, 35 N. Y. 210; *Anthony v. Harvey*, 8 Bing. 191; Story on Bailm., § 88, a, and the learned note. Authorities, *post*.

In all these cases, there is no liability on the part of him through whose innocent instrumentality the injury occurs, and his promise to respond to the damages would be without consideration and void.

In the instance before us, the logs were carried down the river and deposited upon the plaintiff's land, without fault on the part of the defendants or of those building or having charge of the boom. The defendants were not responsible for an injury arising from their being thus deposited, and a promise to make it good would be without consideration, and not obligatory. Neither were the defendants unconditionally liable for the injury arising from allowing the logs to remain where deposited. If they chose to

abandon their property thus cast on shore, they had the right so to do, and no one could call them to account. They were not compelled, however, to abandon it, but had the right to reclaim it; like one whose fruit falls, or is blown upon his neighbor's ground, the ownership is not thereby lost, but the owner may lawfully enter upon the premises to recapture his property. When he does so reclaim or recapture, his liability to make good the damage done by his property arises. He then becomes responsible. Before he can reclaim or recapture the property thus astray, justice and equity demand that he should make good the injury caused by its deposit and its continuance.

The rule is sensibly expressed by Domat, in the articles following, viz.: "1st. He who has found a thing that is lost is bound to preserve it, and to take care of it, in order to restore it to its owner. * * * And when he does restore it, he cannot detain any part of it, nor demand any thing for having found it. But he will recover only what expense he has been at, as shall be explained in the following article. 2d. The person to whom one restores the thing which he had lost, is obliged on his part to repay the money that has been laid out either in keeping the thing or in delivering it to him, as if it was some strayed beast which it was necessary to feed, or that the carriage of the thing from one place to another had obliged the person in whose custody it was to be at some charges; or if any money has been laid out in advertisements, or in having the thing cried, in order to give notice to the owner. * * *

3d. The proprietor of a ground on which is thrown the rubbish of a building that has fallen down, or that which a flood has carried away from another's ground, is obliged to suffer him who has had the loss to take away what remains, and to allow him such free access to his grounds as is necessary for that end. But upon the conditions that are explained in the following article. 4th. In the cases of the foregoing article, he who desires to have back the materials of his building that is fallen down, or that which a flood hath carried away from his land and thrown upon another man's ground, is obliged, on his part, not only to indemnify the proprietor of said ground, as to what damage shall happen to be done by taking away the things which have been thrown upon it, but he is, moreover, bound to repair all the damage which has been already done to the ground by the things since they were cast upon it. But if he chooses rather not to take away any thing, he will owe nothing; for, if he

abandons to the proprietor of that ground all that has been cast upon it, he is not bound to make good a damage that has happened by the bare effect of that accident, and it is enough that he loses what the accident has carried away from him. 5th. If he, whose materials or other things have been thrown by these accidents on the estate of another person, be desirous to take them away, he will be obliged, besides the making reparation for the damage sustained by the owner of the ground, to take away as well the unprofitable stuff that can be of no manner of use as that which is useful and which he is desirous to take away, and to clear entirely the surface of the ground on which the things have been thrown." Domat, vol. 1, pp. 334, 335, part 1, b. 2, tit. 9, § 2, arts. 1, 2, 3, 4, 5, Lond. ed. of 1722.

The logs in question were reclaimed by the authority of the defendants and removed from the premises of the plaintiff. No question is made as to Pond's authority to remove the property, whatever may be said of his authority to promise payment. When the defendants thus removed their property, they became at once responsible for the payment of the damages. If they made no express promise to pay them, the law raises the promise, and will sustain an action based upon it. "Where there is a legal right to demand a sum of money and there is no other remedy, the law will imply a promise of payment." *Poor v. Guilford*, 6 Seld. 276; *Newton v. Coon*, 3 Denio, 134; 5 Greenleaf, 519.

The doctrines of Domat are sustained by *Amory v. Flynn*, 10 Johns. 102, and *Ryder v. Anderson*, 4 Dana, 193. See also Story on Bailm. 121, and note 621, *a. Nicholson v. Chapman*, 2 H. Black. 254, is not analogous, and furnishes no authority to the contrary. Nor is the case of *Binstead v. Bach*, 2 W. Bl. 1117, or of 2 Strange, 278; 1 M. & S. 290; 20 Johns. 28; 10 id. 249; 4 Wend. 652, to the point. This is not the case of a gratuitous or voluntary service, for which no compensation can be demanded. The use of the plaintiff's land was compulsory. He never consented to the use. He had not the power to resist. Whether the logs remained upon the premises an unreasonable length of time, was a question of fact to be decided by the jury, or by the judge acting in their place, if the question became important. 3 B. & C. 213; 4 B. & Ald. 366, 387; 2 B. & B. 692. The finding in favor of the plaintiff determines this question in his favor, upon the well settled principle that every fact not expressly found, shall be deemed to have been found and held

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in such manner as to uphold the judgment. 36 N. Y. 340; 32 id. 464; 28 id. 532; 22 id. 323, 425; 21 id. 551.

The recovery was upon general principles of law, without reference to the statute. It is not necessary to invoke it in his behalf, nor are his rights disturbed by its provisions. The judgment should be affirmed with costs.

Judgment affirmed.

THE PARK BANK V. WATSON, appellant.

(43 N. Y. 420.)

Promissory note — bona fide holder.

A party will be protected as holder of negotiable paper, although fraudulently transferred, when he has received it before maturity, without notice of the fraud and in good faith, and parted with something of value for it at the time of its transfer.

The defendant was the maker of accommodation notes for the benefit of W., and to be used by W. for a specific purpose. Instead of using them for that purpose, W. lodged the notes with the plaintiff as collateral security for a previous debt not yet due, and in lieu of other collateral notes then past due and protested. *Held*, that the plaintiff was a *bona fide* holder for value and entitled to recover.

Two actions. Appeal from a judgment of the general term of the supreme court in the first district, affirming a judgment for the plaintiff entered on a verdict directed by the court.

These actions were brought to recover the amount of three promissory notes made by the defendant, payable to the order of Wilson, Midgley and Jennings, and by them indorsed and delivered to the plaintiff before they matured. They were made without any consideration, at the request and for the accommodation of the payees, and were lent to them on an agreement that they were to be used in getting a loan of \$5,000, to assist them in business, from Isaac N. Phelps, a broker in Wall street, by the deposit thereof and other "good responsible paper," to the aggregate amount of \$15,000, including these notes, as collateral security. The payees, instead of using them for that purpose, lodged them with the plaintiff as collateral security for their note of \$2,000, indorsed by good and

responsible parties, previously discounted by it, but not then due, on the surrender to them of other notes, annexed thereto and left therewith as collateral, and of about the same amount in the aggregate, which had then been protested. One of those was a borrowed note for about \$1,180, made by Thomas Parks, who was a clerk of the said payees, and was shown to be irresponsible. On those facts the counsel for the plaintiff asked for judgment against the defendant.

The court thereupon said: "There was no defense; if there had been no consideration parted with by the bank the defense would have been good, but they gave up collaterals."

The counsel for the defendant excepted to the statement that "there was no defense." He asked the court: "Suppose Mr. Howes (who was the president of the Park Bank, plaintiff) requested Mr. Midgley to borrow this paper and knew it was not *bona fide* paper?" The court replied: "I will charge it is accommodation paper, and will assume that Mr. Howes knew it, and whether Mr. Howes knew it or not the plaintiff is entitled to recover." To this the defendant's counsel excepted. He then asked the court to charge that the plaintiff cannot recover for any amount beyond that which remained after deducting the Parks note. This request was refused, and an exception was duly taken. Proof being then given that nothing had been paid on the \$2,000 note, or upon any of the collaterals, and of the amount due on those in suit, the court directed the jury to find a verdict in favor of the plaintiff for that amount. To which the defendant's counsel also excepted. A verdict in conformity with that direction was rendered, and judgment having been entered thereon, was affirmed at general term, and the case comes before this court from the judgment of affirmance.

Samuel Hand, for the appellant.

Francis C. Barlow, for the respondent.

LORT, J. The plaintiff was, upon the preceding statement of facts, entitled to judgment. Assuming (but not conceding) that there was an unlawful or fraudulent diversion of the notes from the special purpose for which they were made or lent, it does not show that the plaintiff had any knowledge or notice of that fact, nor does

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it appear that a claim to that effect, or any objection to a recovery on that ground, was made on the trial.

After the court had said that there was no defense, stating that the plaintiff had given up collaterals, the question of the defendant's counsel, by way of inquiry and suggestion as to the legal effect of the request of the president to borrow this paper, and of his knowledge that it was not *bona fide* paper, did not direct, nor was it calculated to direct, the attention of either the opposite counsel or of the court to the question of such diversion; and the answer of the judge, saying he would charge it was accommodation paper, and would assume that Mr. Howes, the president, knew it, clearly shows that he understood it to apply to the matters referred to by him, and to those only; and if it was introduced to include any other matter, and especially that of the improper appropriation of the notes, it was the duty of the counsel to refer to it specifically. That would have given the plaintiff an opportunity to disprove such knowledge and notice.

The question is then presented, whether the fact that the notes were given for the accommodation of the payees, and that the plaintiff knew it, was a defense. The bank, as was stated by the court without objection, "gave up collaterals" when it received those notes, and the proof fully justified that statement. The surrender of those notes, under the decision in *Brown v. Leavitt*, 31 N. Y. 113, and the cases there cited, made the bank a holder for value, and entitled it to recover the full amount claimed in those actions, without deducting the amount of the note of Parks.

The fact that the plaintiff still continued to hold the note of \$2,000 discounted by it, and that the notes in question and those surrendered were taken as collateral, only (while as to those surrendered the evidence of indebtedness was canceled), is, in my opinion, immaterial.

The general principle deducible from those decisions is, that a party will be protected as holder of negotiable paper, although fraudulently transferred, when he has received it before maturity, without notice of the fraud, and in good faith, and parted with something of value for it at the time of its transfer.

Upon the application of that principle to the undisputed facts in this case, the plaintiff was clearly entitled to recover, and the direction to that effect to the jury was unexceptionable.

It is evident, from what transpired on the trial after the close of

the testimony, that there was no dispute or question raised as to the facts; the ground taken by the defendant's counsel in his points, that the case was not fairly submitted to the jury, is therefore wholly unwarranted. If he wished any matters to be passed on by the jury, it was his duty to call the attention of the court to them and ask for their submission.

It follows, from the views above expressed, that the judgment appealed from should be affirmed, with costs.

Judgment affirmed.

JUSTICE, appellant, v. LANG and ano.

(43 N. Y. 490.)

Contract — statute of frauds — memorandum signed by one party.

The plaintiff brought action for the non-performance of an agreement contained in the following memorandum, signed by the defendants: "New York 18th May, 1861. We agree to deliver P. S. Justice one thousand Enfield pattern rifles, with bayonets, no other extras, in New York, at eighteen dollars each, cash upon such delivery; said rifles to be shipped from Liverpool. not later than 1st July, and before, if possible. W. BAILEY LANG & Co." *Held*, that this memorandum was a sufficient compliance with the requirements of the statute of frauds, to bind the defendants. That there was a good and sufficient consideration for their obligation, and that the plaintiff was, therefore entitled to recover.

This was an action to recover damages for a breach of contract. At the trial the court ordered judgment, dismissing the complaint, which was affirmed on appeal by the superior court. The plaintiff then brought this appeal.

Edmund Terry, for appellant.

Samuel E. Lyon, for respondents.

LORT, J. The plaintiff brought this action for the recovery of damages from the defendants (composing the firm of W. Bailey Lang & Co.), for the non-performance of their promise, contained in the following memorandum or instrument in writing, signed by them, viz.:

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"New York, 1843 May, 1861.

"We agree to deliver P. S. Justice one thousand Enfield pattern rifles, with bayonets, no other extras, in New York, at eighteen dollars each, cash upon such delivery. Said rifles to be shipped from Liverpool not later than 1st July, and before, if possible.

"W. BAILEY LANG & CO."

After proof of the negotiation of the parties, the execution of the instrument by the defendants, its acceptance by the plaintiff, and the introduction by him of other evidence to sustain his action, but without showing that a counterpart of the memorandum, or any instrument in writing whatever, was ever signed by him to accept the rifles, or pay for them, he rested his case. Then the counsel of the defendants, after the denial of a motion to dismiss the complaint, proceeded to examine witnesses on their part; and, after some testimony had been given (but which was afterward considered as stricken out), the judge stated that he much inclined to think that the memorandum was a *nudum pactum*, and, after referring to its contents, said: "It expresses no consideration, and there is no evidence tending to show that the proposed purchaser ever agreed to take the rifles or to pay for them;" and remarked that the admission of testimony offered to prove that the contract was obtained fraudulently, or by false representations, would be in the face of his impressions in regard to the contract itself; that if it was a mere *nudum pactum*, without consideration, it would be useless to prove any conversation in regard to it. He thereupon, on the ground above stated by him, and on motion of the defendants' counsel, dismissed the complaint, and an exception to that decision was duly taken. The ground assigned by the learned judge for the dismissal of the complaint renders it necessary to examine into the validity of the contract at common law, as well as under the requirement of the statute of frauds.

Blackstone, in his commentaries (vol. 2, page 422), defines a contract to be "an agreement upon sufficient consideration to do, or not to do, a particular thing;" and he says the price, or motive of the contract, we call the consideration. Page 444. Kent's definition of an executory contract is, an agreement of two or more persons, upon sufficient consideration, to do or not to do a particular thing. 2 Kent's Com. 449, etc. Comyn, in his work on contracts (page 2), says: A simple contract, or contract by parol, is defined in our law books to be "a bargain or agreement volun-

tarily made upon good consideration, between two or more persons capable of contracting, to do, or forbear to do, some lawful act." * * * * And "six things appear necessary to concur: 1st. A person able to contract. 2d. A person able to be contracted with. 3d. A thing to be contracted for. 4th. A good and sufficient consideration, or *quid pro quo*. 5th. Clear and explicit words to express the contract or agreement. 6th. The assent of both the contracting parties." He adds: "So, every contract should be obligatory on both the contracting parties, or both should be at liberty to recede therefrom; but to an agreement or contract there is no prescribed form of words, but any words which show the assent of the parties is sufficient." He also, in this connection, states that a voluntary promise, without any other consideration than mere good will, or natural affection, to give to another a sum of money, as, for instance, twenty pounds, and that he will be a debtor for such sum, is no contract, but a mere *nudum pactum*, and that the law will not compel the execution by a person of what he had no visible inducement to engage for, but any degree of reciprocity will prevent the agreement or promise from being classed under this rule; and he illustrates the distinction by saying, that, in the instance or case put, if any thing, however trifling, were done or to be done or given for the twenty pounds, it would be a valid contract, and binding upon the parties.

Chitty says: "A contract or agreement, not under seal, may be thus defined or described: A mutual assent of two or more persons competent to contract, founded on a sufficient and legal motive, inducement or consideration, to perform some legal act, or to omit to do any thing, the performance of which is not enjoined by law." Chitty on Contracts, 3.

All of these definitions are substantially the same; and upon the application of that given by Comyn, which embraces the others, and appears to me to be a precise and explicit exposition of the necessary ingredients of a contract, to the memorandum in question, with his illustrations, it will be seen that it constitutes a sufficient and perfect agreement.

It shows that the plaintiff and the defendants were the contracting parties, the first as seller, and the last as purchaser; that the thing contracted for was Enfield pattern rifles; that a good and sufficient consideration, or *quid pro quo*, was expressed, being the delivery of such rifles to the defendant, at New York, on the pay-

ment by him to the plaintiff of eighteen dollars each, cash, upon such delivery. Clear and explicit words were used to express the terms of the contract and agreement, leaving no doubt as to the subject-matter thereof, the time and place for the delivery of the goods to be delivered, and the price or sum to be paid, and when such payment was to be made; and the assent of both the contracting parties also appears, that of the sellers, by subscribing their firm name at the end of the contract, and that of the buyer by the acceptance thereof. Although there is no distinct and express promise in terms by the plaintiff to pay the price specified, the terms, "cash on delivery," imply a promise, and create an obligation to make such payment when the rifles are delivered.

I shall, therefore, assume that the contract was valid and binding on the defendants at common law, and, as I understand the prevailing opinion of the general term, its validity, as a common-law agreement, was conceded; and the affirmance of the judgment at the trial term was placed on the sole ground that it was void under the statute of frauds. 2 R. S. 136, etc.

It will now be considered with reference to the requirements of that statute, which, so far as it applies to the sale of goods and chattels, declares that "every contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, shall be void, unless, 1st. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or, 2d. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, 3d. Unless the buyer shall, at the time, pay some part of the purchase-money." 2 R. S. 136, § 3. And a subsequent section (§ 8) declares that every instrument, by any of the provisions of the title to be subscribed by any party, may be subscribed by the lawful agent of such party.

This is substantially, so far as it affects this case, the same as the fifteenth section of the former statute of frauds in this state, entitled "An act for the prevention of frauds," passed 26th February, 1787. 1 Greenl. ed. of the Laws, vol. 1, 391, etc., and 1 Rev. Laws of 1813, vol. 1, p. 75. That section enacts "that no contract for the sale of any goods, wares and merchandise, for the price of ten pounds or upward, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment; or

that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized," and is in its terms a transcript of the seventeenth clause of the English statute of frauds (29 Car. II, ch. 3), which Chancellor KENT says "is assumed to be the basis of the several statute laws of the several states on this subject." 2 Kent's Com. 510.

In this connection it may be useful to advert to the fact that subdivision 1 of section 3 of the revised statutes, as above set forth, is materially different from its provisions as reported to the legislature by the revisers. Those were in the following terms, viz.: "A note or memorandum of such contract, containing the names of the parties, a description of the things sold and the price thereof, be reduced to writing at the time the contract is made, and be subscribed by all the parties thereto." See 3 Revisers' Notes in New York Statutes at Large, Edmonds' ed., vol. 5, p. 395. The effect of the statute is to make additional requirements to what were required at common law to make a valid contract. They are specifically stated; and, so far as it relates to or affects the contract in question, are "that a note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby."

It is claimed by the defendants, and it was so held by the general term, that the omission of the plaintiff to subscribe the contract rendered it void, even as to the defendants, by whom it was subscribed, and, consequently, that it was wholly inoperative and ineffectual for any purpose or to any extent whatever. Is this the proper construction of the statutory provision?

In deciding this question it is important to consider the object of the statute. That is declared in the act of 26th February, 1787. It is entitled "An act for the prevention of frauds;" and after making several enactments, it enacts (as is stated in the beginning of section 9), "for the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury," several provisions, and, among others, the fifteenth section, above cited.

The present statute on the subject is confessedly for the same purpose. The enactment that every contract for the sale of any goods for the price of fifty dollars or more, where the buyer neither accepts or receives a part of them, nor at the time pays some part of the purchase-money, shall be *void* "unless a note or memorandum

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of such contract be made in writing, and be subscribed by the parties to be charged thereby," does not make such a contract *unlawful*, but its object is to declare that it shall be of no binding force to charge any party who has not subscribed a note or memorandum thereof in writing with any liability thereon. It evidently contemplates legal proceedings against one of the parties to it, and its design is to prevent perjury and subornation of perjury, by refusing the aid of the law in the enforcement of any rights claimed under it against him, without such written evidence.

The end and object of the statute are attained by written proof of the obligation of the defendant; he is the party to be charged with a liability dependent on and resulting from the evidence, and he is intended to be protected against the dangers of false oral testimony. To say that the plaintiff or the party seeking to enforce a contract is himself a party to be *charged* therewith is a perversion of language.

The term "parties" in the section quoted is used in connection with the words "*to be charged* thereby," and does not necessarily include, nor can it be construed to include, *all* the parties to the contract. It is, on the contrary, limited and restricted, by the qualifying words, to such only of those parties as are to be bound or held chargeable and legally responsible on the contract, or on account of a liability created by or resulting from it.

If it had been intended to extend to, and include, all of the parties, those words "*to be charged* thereby" would have been unnecessary and superfluous. The appropriate language to express such intention would have been, that the note or memorandum should be subscribed "by all the parties thereto," or "by the parties thereto," or some general terms, without any limitation or restriction to any particular class or designation of parties.

The action of the legislature, moreover, when considered in connection with the recommendation of the revisers, is in harmony with and strongly confirmatory of this construction. That recommendation was, that the note or memorandum should be subscribed by *all the parties* thereto; and if it had been adopted there would have been no room for doubting as to the intent of the requirement. So, on the other hand, the omission to make the change recommended, and the enactment of the provision by the continuance of the phraseology and terms, "the parties to be charged thereby," clearly indicate that the construction that had been given thereto

in numerous cases, declaring that it was enough that the note or memorandum of the contract be signed or subscribed by the party to be charged, was expressive of the true meaning of those terms.

The counsel for the respondent, however, in arguing that the memorandum must be subscribed *by both parties*, claims and insists that "an examination of the history of the question will show that no decisions to the contrary have been made in the court of last resort in this state, and that those which have been made to the contrary in other courts have not been well considered;" and in support of that proposition he refers to several reported cases where the question has been the subject of consideration, and it will be proper to examine them with the view of ascertaining whether he is sustained in the construction he has given to them, or as to the effect to which they are entitled as authority. The first is that of *Raget v. Merritt*, 2 Caine's, 117, decided in 1804. It was an action for not delivering two hundred and twenty barrels of flour according to agreement. It appeared that the defendant agreed to sell the flour, and a memorandum of the sale, made and signed by him, was delivered to the plaintiff's broker, who negotiated the sale for him. A note of one Lyon was to be given for the flour, but before it was tendered he failed. One of the objections taken to the recovery was, that the contract was void under the statute of frauds, because the memorandum or agreement was signed only by one party, and, therefore, though obligatory on him, it could not be enforced against the plaintiff, and that this rendered the whole a mere *nudum pactum*. Judge SPENCER held the objection to be untenable, and said: "The statute of frauds requires, in certain contracts, a memorandum to be signed by the parties to be charged. If there are acts to be done by both parties, and the one who is to perform a principal part (as here the delivery of the flour) sign, and it is accepted by the other party, there can exist no doubt but that such contract would be mutually obligatory. In this case, I hold that there was a valid contract executory in its nature; but, before the period of its execution arrived, the consideration agreed to be given by the plaintiff wholly failed by the insolvency of Lyon."

The question of the necessity of the execution or signing of the agreement by both parties thereto was involved in the case, and although it is true that the judge said, before he made those remarks, that as the opinion he was about to give in deciding it was not

founded on either of the objections taken (the other being as to a variance between the contract set forth in the declarations and the proof), it would be unnecessary to enter into a minute examination of them, yet what he did say in reference thereto was, nevertheless, an authority on the question.

The next case was that of *Bailey & Bogert v. Ogden & Ogden*, 3 Johns. 399, decided in 1808, which was an action of assumpsit by the plaintiffs for the price of a quantity of sugar, alleged to have been sold by them to the defendants through the agency of one Huguet, acting as a broker for them. An entry of the sale and the terms was made by one of the plaintiffs and kept by them, commencing "sold Huguet for J. Ogden & Co., notes, with approved indorser," and then stating some other terms, but not specifying the quantity of the sugar sold. It was read to Huguet, and there was evidence tending to prove that he said it was correct. He himself had on the previous day made an entry of the transaction in pencil in his own memorandum book, commencing "J. Ogden & Co.—Bailey & Bogert," stating some other particulars, but saying nothing about an indorsement; and he testified that he did not assent to that. The extent of Huguet's authority and some other matters were the subject of dispute on the trial. The judge, among other things, charged: "That a note or memorandum, to satisfy the statute of frauds, must contain the names of the parties and the terms of the contract; and that, if the names of the parties be inserted at the top, in the middle, or at the bottom, by their authority, it is sufficient;" and then, after adverting to the fact that there was but one special count on the contract, which averred a delivery, and that averment must be proved, even if there had been a note or memorandum within the statute, submitted it to the jury to find whether there had been an absolute delivery to the defendants and acceptance by them of the goods. They found a verdict for the defendants.

A motion was made in the supreme court to set aside that verdict and for a new trial. The counsel for the plaintiffs, among other points, insisted that it was not necessary that both parties should sign the note or memorandum of the contract, citing *Rogert v. Merritt* (*supra*), and *Sanderson v. Jackson*, 2 Bos. & Puller, 238, and that if there was a sufficient memorandum in writing, proof of a delivery of the goods was not required.

The counsel for the defendants, in reference to the sufficiency of

the note or memorandum, after referring to the language of the statute, said that none of the authorities cited by the plaintiffs counsel applied to the case; that "when the memorandum is signed by one party only it must be by the party to be charged;" and argued that the "*bare assent*" of the party to be charged was not equivalent to a signing.

KENT, C. J., in delivering the opinion of the court, stated that the case depended on the decision of two general questions; one of which, and the first of them, was whether there was a note or memorandum in writing, binding upon the defendants, within the meaning of the statute of frauds; and after referring to the memorandum made relative to the transaction as above stated, he said: "The entry of the plaintiffs, made and retained by them, was not binding upon the defendants, because the statute requires the note or memorandum to be signed by the party to be *charged*. The numerous cases admitting an agreement to be valid within the statute, if signed by one party only, are all of them cases in which the agreement was signed by the party against whom the performance was sought. Some of the cases arose under the fourth and others under the seventeenth section of the English statute, but the words are in this respect similar and require the same construction." He then, after remarking that it had been said "that there would be a want of mutuality, if the plaintiffs in the case were bound by the entry and the defendants would not be," says: "Whether the plaintiffs, in the present case, would be bound at law by their memorandum, or if bound, whether they might have relief in equity, are questions not before us, and concerning which we are not now to inquire;" and, after an examination of the facts disclosed in the case, he came to the conclusion that there was no note or memorandum in writing which took the contract there relied on out of the statute of frauds, so far at least as it respected the defendants, nor a delivery or acceptance of the sugars, and that therefore the motion for a new trial should be denied.

This case, while it cannot be considered as an actual *authority* in support of the present action, is nevertheless important, as recognizing the fact that there were numerous cases holding an agreement to be valid within the statute, if signed by one party only, when such party was the one against whom the performance was sought, and the remark of the learned chief justice, "whether the plaintiffs in that case were bound at law by their memorandum, or, if bound

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whether they might have relief in equity, were questions not then before the court, and concerning which they were not then bound to inquire;" was as consistent with a doubt or question as to the sufficiency of the memorandum to bind the plaintiffs, conceding it to have been signed by them, as it was in reference to their liability, if it had been so signed and was in other respects sufficient.

What was thus said can on no ground be considered as questioning the force or effect of the "numerous cases" referred to by him as authority.

The next case was that of *Merritt & Merritt v. Clason*, 12 John. 102, decided in 1815. There it appears that John Townsend, a broker, was employed by the defendant to purchase rye; that he, on application to Isaac Wright & Son, in New York, the agents of the plaintiffs, agreed to purchase of them 10,000 bushels at one dollar per bushel, and they authorized him to sell the same to the defendant on the terms agreed on; he then informed the defendant of the terms of sale and was directed by him to make the purchase accordingly. Thereupon he went to Wright & Son and closed the bargain with them, as agents of the plaintiffs, and in their presence wrote in his memorandum book with a pencil as follows: "February 13th, bought of Daniel & Isaac Merritt, by Isaac Wright & Son, 10,000 bushels of good merchantable rye, at one dollar per bushel, deliverable in the last ten or twelve days of April next, alongside of any vessel or wharf the purchaser may direct, for Isaac Clason of New York, payable on delivery." All the other memoranda in the same book were written with a lead pencil. Soon after the purchase was thus completed, the broker informed the defendant of it, but did not give him a copy of the memorandum. The plaintiffs repeatedly tendered the rye to the defendant, according to the terms of the agreement, and he refused to accept and pay for it. They then gave him notice, that, unless he received and paid for the rye, they would, on a day and place specified, sell the same at public auction, and hold him accountable for the deficiency, in case it should sell for less than the price mentioned in the contract and the expenses. On his refusal to complete the purchase, the property was sold by the plaintiffs at public auction, pursuant to the notice; and the suit was brought by them to recover the difference between the net proceeds of such sale and the contract price. A verdict was taken, subject to the opinion of the court, on a case containing the facts

above stated, and which either party was to be at liberty to turn into a special verdict.

On the argument of the case in the supreme court, Mr. Baldwin, one of the counsel of the defendants, among other questions, raised the point, on the authority of *Champion v. Plummer*, 4 Bos. & Pull. (1 N. R.), 252, that a memorandum signed by the seller only was not sufficient; that the plaintiffs were not bound thereby, and if they were not, neither could the defendant be bound.

PLATT, J., in delivering the opinion of the court, stated that the only point was, whether the memorandum made by John Townsend was a sufficient memorandum of the contract, within the statute of frauds, to bind the defendant; and, after expressing an opinion on other questions presented by the case than that raised by Mr. Baldwin, as above stated, as to which he said nothing, he came to the conclusion that the memorandum stated, with reasonable certainty, every essential part of the agreement, and that the plaintiffs were entitled to judgment.

The case was carried to the court for the correction of errors, on a special verdict finding the facts above stated (with two other causes in which the facts, so far as affected the questions involved, were substantially the same), and is reported in 14 Johns. 484, etc., under the title of *The Executors of Clason v. Merritt & Merritt*; and one of the other cases is by same plaintiffs in error against Bailly & Voorhees, and that case is the one particularly referred to in the opinion of the court. In that court the point was raised on the part of Clason's executors, that the agreement was not signed by both parties; and Chancellor KENT, in giving the opinion of the court, said: "Clason's name (that of the purchaser) was inserted in the contract by his authorized agent; and if it were admitted that the name of the other party was not there by their direction, yet, the better opinion is, that Clason, the party who is sought to be charged, is estopped by his name from saying that the contract was not duly signed within the purview of the statute of frauds, and that it was sufficient if the agreement was signed by the party to be charged," adding: "It appears to me that this is the result of the weight of authority, both in the courts of law and equity;" and after reviewing several cases in both courts sustaining that result, he said: "There was nothing to disturb the strong and united current of authority of those cases, but the observations of Lord Ch. REDESDALE, in *Lawrenson v. Butler*, 1 Sch. & Lef. 18, who thought

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that the contract ought to be mutual to be binding, and that, if one party could not enforce it the other ought not; and said, that, to decree performance when one party only was bound, would "make the statute really a statute of frauds, for it would enable any person who had procured another to sign an agreement to make it depend on his own will and pleasure whether it should be an agreement or not." He then, after remarking that the intrinsic force of the argument, the boldness with which it was applied and the commanding weight of the very respectable character who used it, caused the courts for a time to pause, but that they had, on further consideration, resumed their former track; and, citing authorities on both sides of the question, added: "I have thought, and have often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce, at his pleasure, an agreement which the other was not entitled to claim. It appears to be settled (*Hawkins v. Holmes*, 1 P. Wm. 770), that, though the plaintiff has signed the agreement, he never can enforce it against the party who has not signed it. The remedy, therefore, in such case is not mutual. But, notwithstanding this objection, it appears from the review of the cases that the point is too well settled to be now questioned." He then says: "There is a slight variation in the statute respecting agreements concerning the sale of lands, and agreements concerning the sale of chattels, inasmuch as the one section (being the fourth section of the English and the eleventh section of our statute) speaks of the *party*, and the other section (being the seventeenth of the English and the fifteenth of ours) speaks of the *parties* to be charged; but I do not find from the cases that this variation has produced any difference in the decisions. The construction as to the point under consideration has been uniformly the same in both cases." And after the full discussion and consideration of this question he comes to the conclusion, that "Clason, who signed the agreement, and is the party sought to be charged, is, then, according to the authorities, bound by the agreement, and he cannot set up the statute in bar;" adding, "but I do not deem it absolutely necessary to place the cause on this ground, though as the question was raised and discussed, I thought it would be useful to advert to the most material cases, and to trace the doctrine through the course of authority."

He then says, that, in his opinion, "the objection itself is not well founded in point of fact;" and after a reference to the memorandum and its contents, and the facts found by the special verdict, he concludes that the contract was, in judgment of law, reduced to writing and signed by both parties.

Another objection, taken by Olason in the supreme court, and by the executors in the court for the correction of errors, to the validity of the contract (not material to the case now under review), was then considered by the learned chancellor, and held to be untenable; and thereupon the judgment of the supreme court was affirmed (two senators dissenting).

It may be important in this connection to advert to the fact that this opinion was delivered in 1817, nearly nine years after what was said by him as chief justice in *Bailey & Bogart v. Ogden*, 3 Johns. 399, *supra*, and about three years after the intimations made by him in *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282, and *Benedict v. Lynch*, id. 370, to the effect, that an agreement concerning lands, to be enforced in equity, should be mutually binding, and to which he probably had reference in that opinion, and as to which he said, therein, that it appeared from the view of the cases that the point was too well settled to be then questioned.

Although, in view of the conclusion arrived at by the learned chancellor on the other point (that the contract was, in judgment of law, reduced to writing and signed by both parties), it was not, as he himself stated, absolutely necessary to place the cause on the ground first discussed and considered by him as above mentioned; yet, as it was raised by the facts found by the special verdict, on which the supreme court had given judgment, and on the argument in the court for the correction of errors, it was material that it should be considered by him. He remarked, in the commencement of that opinion, that the case struck him, on the argument, as being plain; but as it may have appeared to other members of the court in a different, or, at least, in a more serious, light, he deemed it proper and necessary to state the reasons for his opinion on both the questions subsequently examined and discussed by him. It, as it appears to me, is a perversion of terms, and an entire misconception of the effect and force of the able and elaborate opinion of that learned and distinguished jurist, to characterize or treat it as a mere *obiter dictum*.

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GARDINER, J., in *James v. Patton*, 2 Seld. 9, in which it had been claimed by counsel that a case, cited on the argument in support of, and, indeed, decisive of, the question then under review and consideration, might have been decided on other grounds than those stated in the prevailing opinion on that point, said: "We are now gravely informed that it was possible to reverse the judgment upon other grounds. The effect of any decision in a court composed of more than a single judge might in this way be avoided. But when two questions are presented to the appellate court, upon which their decision is asked, both of which are discussed by counsel, and each is considered and determined in the only opinions read in the hearing of the members, the majority must be deemed to acquiesce in the conclusions upon those questions reached in those opinions, unless some one dissents. With a different rule, there could be no such thing as the establishment of a principle by the court of last resort, when more than a single point was presented." And PAIGE, J., said in the same case: "Where several questions arise in a cause, and the opinions delivered agree in regard to all of them, and the other members give a silent vote of concurrence, then all the questions will be deemed to have been determined by a majority of the court, and the case will be regarded and respected as an authoritative adjudication of all such questions."

In the case of *Nason v. Bailey*, 14 Johns. 484, *supra*, the opinion of the chancellor was the only one delivered, and must be held to be an authority of the court of last resort on the very question now presented for our decision and adjudication.

The question again arose in the supreme court in 1829, in *Russell v. Nicoll*, 3 Wend. 112, which was an action by the plaintiffs claiming damage for the non-delivery of a quantity of cotton alleged to have been purchased by them of the defendants.

The contract was substantially in all essential particulars like the one in the present case. It was in these words:

"NEW YORK, February 9th, 1825.

"Sold by Daniel Rapalye, for our account, to R. M. and J. Russell, five hundred bales of cotton, at sixteen and a half cents per pound. Said cotton was purchased for our account at Huntsville, and is to be delivered, on its arrival at this port from New Orleans, at any time between the present date and the first day of June next, and the amount to be cash on delivery, to be reweighed, and two per cent tare allowed.

"FRANCIS H. NICOLL & CO."

The plaintiffs were nonsuited on the trial at the circuit, on grounds other than that now under consideration. But on the review of the case by the supreme court, the counsel for the defendants stated that the plaintiffs, if an action had been brought against them on the contract, might have interposed the statute of frauds as a defense, they not having signed any note or memorandum in writing of the bargain; and, the agreement produced being signed only by the defendants, that the plaintiff could not have been holden, and the defendants were not bound, and that, though this objection was not taken at the circuit, the court would not grant a new trial if they perceived that the plaintiffs must be nonsuited on that ground; as to which point the court, by MARCY, J., said, in the commencement of his opinion: "It was insisted on the argument that the contract declared on was within the statute of frauds, and void for not being reduced to writing and signed as the statute directs. This objection is not sustainable. If the contract be within the statute, it is very clear that the signing by the defendants is a compliance with its requirements. *Egerton v. Mathews and another*, 6 East, 307; *Saunderson v. Jackson and another*, 2 Bos. & Pul. 238."

The question was thus distinctly raised and decided in the supreme court, and the decision is a distinct and positive authority thereon. If the objection had been well founded, it would have been decisive against the plaintiffs' right of recovery, and there would have been no necessity to consider the questions raised at the circuit, and which were afterward elaborately discussed in the opinion. Those questions were based on the assumption that the contract was valid and obligatory on the defendants. The circumstance that the question arising on the statute of frauds was not raised at the circuit does not impair, or in the least weaken, the effect of the decision thereon by the supreme court. On the contrary, it shows that the eminent counsel for the defendants did not at that time deem it available and effectual, and they probably presented it, in opposing the motion to set aside the nonsuit, on the principle that they would not then fail to present and urge any point on which the nonsuit might be sustained or supported.

The next case referred to by the counsel was that of *Dykers & Alstyne v. Townsend*, reported in 24 N. Y. 57, etc. That was an action to recover damages for the failure of the defendant to receive and pay for 1,100 shares of the capital stock of the New York and

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Erie Railroad Company, purchased under three several contracts, one of which is set forth in the case, and is in the following form :

"NEW YORK, *May 2d*, 1854.

"I have purchased of Dykers, Alstyne & Co. 500 shares of the New York and Erie Railroad Company at seventy (70) per cent, and deliverable in sixty days buyer's option, with interest at the rate of six per cent per annum.

"W. S. HOYT."

The other two were in the same form, except that one of them was signed by one Brown. It was alleged and proved on the trial that Hoyt and Brown were brokers, and acted as the agents of the defendant in making the contract.

When the plaintiff rested, the defendant moved to dismiss the complaint, on the grounds that the contracts were signed by Brown and Hoyt in their own names, and that the name of the defendant nowhere appeared upon them; that parol evidence could not be introduced to show that the defendant was the person for whose benefit the contracts were made, and that the plaintiffs had not shown any valid contract between themselves; and the defendant took an exception. Proof was then offered of certain facts, for the purpose of showing the contract void under the stock-jobbing act, in force at the time of the sale, which was rejected, and the defendant took an exception. The plaintiff recovered a verdict, and judgment thereon was rendered at general term, in the first district, which, on an appeal to this court, was affirmed without any dissent to such affirmance. One of the judges, SELDEN, J., was absent, and another, JAMES, J., expressed no opinion. That *decision*, so far as it affects the present question, gives no color for sustaining the judgment in the case now under review. It is true that Judge HOYT, in giving his opinion for its affirmance, remarked, that, as an original question, he should have had no hesitation in saying, in a case where the contract was entirely executory on both sides, and no part of the consideration had been paid, that it was necessary that it should be in writing, under the statute, and be signed by both parties thereto, or their agents, in order to be binding upon either; or, in other words, there being no consideration paid, the promise of one party would be the consideration for the promise of the other, and that both must be in writing to charge either; and, after referring to the distinction between the section of the statute applicable to that case,

and section 8, relating to a contract for the sale of land, which he concedes, on the authority of this court, in *Worrall v. Munn*, 1 Seld. 244, is only required to be signed by the party by whom the sale is to be made, and after adding, that, in the case of a contract for the sale of goods, he should say the party to be charged means the vendor upon his contract to sell, and the vendee upon his contract to accept and pay for the goods, he added, that this question did not appear to have been directly raised on the trial; if it had been, it might, perhaps, have been obviated by the production of a counterpart of the contract, signed by the plaintiff, and then said: "As there are several authorities which seemingly, at least, give a different construction to this and similar provisions in the former statute of frauds, I do not propose to further discuss the question at this time." And after a more particular reference to the requirements of the statute, he concludes with the remark: "In this case, a note or memorandum of the contract was made in writing, and signed by the lawful agent of the defendant, and we think that this was sufficient compliance with the statute, according to the settled construction that has been given to it."

The only other case referred to by the respondent's counsel, on this question, was that of *Brabin v. Hyde*, 32 N. Y. 519, which he says decided that the memorandum must be signed by both parties. This is clearly a mistake.

The action was brought by the plaintiff to recover the possession of a mare and colt, which he claimed as owner, by purchase from one Milton Blackmer in August, 1857; and which, on the third day of September next thereafter, the defendant took from his possession, under a claim that he owned them under a purchase from the same vendor in the month of July preceding. The plaintiff recovered a verdict, on which judgment was entered. That judgment was reversed by the general term on appeal, and the plaintiff thereupon appealed to this court. The judge on the trial, in his charge to the jury, after stating that the defendant had given evidence of a prior bargain, and that it was objected by the plaintiff that the contract under which he claimed ownership was void by the statute of frauds, read and explained the statute, and then charged, "that, according to the defendant's narrative of facts, the contract rested solely in words. There was no other evidence of it; there was no delivery of the property or memorandum made, as the contract was narrated by him, nor any payment, nor was the property present at

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any time, or any thing to save it from the statute of frauds. I advise you that the contract for the purchase of the horses by the defendant, as narrated by himself, is invalid." To which there was an exception.

When the case was reviewed by this court, BROWN, J., in giving the opinion on the reversal of the order of the general term granting a new trial, referred to the facts detailed in the narrative of the defendant; and, from the learned judge's statement of them, it appeared that a part of the price agreed to be paid by the defendant for the mare and colt was to be credited on his books, when he got to his house, on account of a debt owing and due to him from Blackmer; that he went home and made the entry in his book, giving him credit on the day of the purchase for the amount that was to be so credited. It was an original entry. On his cross-examination, it further appeared that he kept a day-book and a ledger for the purposes of his business; that the entries to Blackmer's credit were not upon those books, or in any account of his daily transactions; and that all that appeared upon any book was an entry made of the mare and colt upon a blank leaf, on which there were no other entries. It was not claimed that he gave Blackmer any receipt or discharge for the money for the mare and colt, or that he communicated to him what he had done. There were some additional facts stated, for the purpose of showing a delivery of the mare and colt, which are immaterial to be noticed here; and the learned judge, after the conclusion of his statement of the facts, said: "These are the facts upon which the defendant relies to take the case out of the statute of frauds. There was no delivery of the property to the purchaser, and no memorandum of the sale signed by the parties;" and then, after stating the charge to the jury as above set forth, and making some general remarks on the insufficiency of words, merely, and the necessity of acts as evidence of a purpose to part with, or to accept, the ownership of personal property, he said: "There must have occurred one of the three acts mentioned in the statute, or the sale will not be effected. These acts are not to be performed by one party only; they are to be concurred in by both parties to the contract. If the memorandum in writing is relied upon, it must be signed by the parties; not the party to be charged thereby." He then, after giving his views of what is necessary, when either a delivery of the goods, or a part of them, or the payment of some part of the purchase-money, is depended upon as the consummation of the contract, and after the

application of his construction of the requirements of that statute to the facts of the case, closes the opinion with this remark: "I think the judge at the circuit, in his charge to the jury, was entirely right;" and thereupon the order of the general term granting a new trial was reversed, and the judgment on the verdict was affirmed.

No other opinion appears to have been given in the case.

It is evident, from the opinion and the conclusion arrived at by the learned judge, that there was no question involving the construction of the section of the statute now under consideration. On the contrary, he declares that the judge at the circuit, who had charged the jury, "that, according to the defendant's narrative of the facts, the contract rested *solely in words*," was entirely right. The remark that it was necessary that a memorandum in writing of a contract should be signed by both parties to it was gratuitous; and certainly there is not the least color for saying that this court in that case "decided that the memorandum must be signed by both parties."

I have now examined, with much and perhaps unnecessary particularity, the cases referred to by the counsel to sustain his position, that there has been no decision in the court of last resort, and no well-considered one in the other courts, holding it to be unnecessary that the note or memorandum of the contract for the sale of goods should be signed by both parties. That examination shows, not only that all of them, except the case of *Bailey v. Ogden*, 3 Johns. 399, *supra*, involve the question, and hold that the statute is complied with when the note or memorandum of the contract is signed or subscribed by the party to be charged thereby, but also that the question has been decided after a careful consideration thereof; and, in the case of *Bailey v. Ogden*, the same principle is distinctly and fully recognized by KENT, C. J., as appears by his statements above referred to.

I will add another case (that of *Davis v. Shields*, 26 Wend. 341), in the court for the correction of errors, decided in 1841, where the question was again raised, and considered by Chancellor WALWORTH and Senator VERPLANCK. The chancellor, at page 350, said that "the former statute of frauds required the note or memorandum of the agreement to be signed by the parties to be charged thereby, and the courts had not only decided that it was not necessary that it should be signed by both parties, so as to make it legally binding on both, or upon neither, but they had in many cases held that a literal signing of the memorandum by the party who was sought

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to be charged thereby was not necessary." Senator VERPLANCK, at page 362, said: "A doubt naturally arises whether, under our revised statutes, the words to 'be subscribed by the parties to be charged' do not require that the agreement should be, from the first, binding, by means of an authorized signing, upon all the parties to the bargain;" and, after referring to the case of *Clason v. Merritt*, which he considered as having settled the question in that court, and stating that the decision was in conformity with numerous prior decisions, as was shown in the opinion of Chancellor KENT in that case, he said: "It seems to me these words must be taken in their fixed and adjudicated sense, according to which it is enough that the agreement be signed, or be authorized to be signed, by the party to be charged in the suit;" and adds: "Nor is this interpretation without the support of reasons of equity, independent of authority. It is within the literal sense of the words used." And then, after some remarks in support of those views, he concludes: "I adhere, then, to the old adjudicated meaning of the words retained from the original statute, and consider it sufficient if the memorandum was authorized by the vendors, who are now to be charged, although it might not have been originally binding on the vendee."

In that case, the question was also presented whether the contract was "*subscribed*" within the requirements of the revised statutes, without being actually signed below or at the end of the memorandum, and it was decided that it was not; and the decision of the supreme court holding to the contrary, as the case is reported in 24 Wend. 324, was reversed.

In addition to the above cases I will cite, as authority sustaining the sufficiency of the signature by the party to be charged, the following: *West v. Newton*, 1 Duer 277, 283; *Woodward v. Harris & Aspinwall*, 3 Sand. Sup. Co. 272-277; *Fenley v. Stewart*, 5 id. 101-105. These authorities are in conformity to the decisions on the English statute, which were recognized as authority by Chancellor KENT in *Clason v. Bailey*, 14 Johns. 484, etc. Among those were *Saunderson v. Jackson*, 2 Bos. & Pul. 238; *Champion v. Plummer*, 4 id. 252; *Egerton v. Matthews*, 6 East, 307; *Allen v. Bennett*, 3 Taunt. 169. In *Egerton v. Matthews*, the action was brought by the seller against the buyers for not accepting and paying for certain goods, which the defendants had contracted to purchase by the following memorandum in writing: "We agree to give Mr. Egerton nineteen cents per pound for thirty bales of

Smyrna cotton, customary allowance cash, three per cent, as soon as our certificate is complete." It was dated 2d September, 1803, and was signed by the defendants, the buyers, only. They had before that time become bankrupts, and their certificate was waiting for the lord chancellor's allowance, and after it was allowed, they signed the memorandum again. On the opening of the case upon the trial it was objected, that the contract was altogether executory, that no consideration appeared on the face of the writing for the promise, and that there was not any mutuality in the engagement, and, therefore, that it was void by the statute of frauds. 29 Car. II, ch. 3.

The objection prevailed, and the plaintiff was nonsuited; but on a motion to set aside the nonsuit, Lord ELLENBOROUGH, C. J., observed, that the 17th clause of that statute required "some note or memorandum in writing of the bargain signed by the parties to be charged by the contract;" and that this memorandum above quoted was a memorandum of the bargain, or at least so much of it as was sufficient to bind the parties to be charged therewith, and whose signature to it was all that the statute required.

The question again arose in *Allen v. Bennett*, 3 Taunton, 169. The action was brought by the buyer against the seller for the non-delivery of goods, and was based on certain entries of the sale made by defendant's agent in a book of the plaintiff. The sale was subsequently recognized in a correspondence by the plaintiff with the defendant, but there was no evidence that the plaintiff had signed any contract to bind himself. It was objected on the trial that there was not a sufficient note in writing within the statute of frauds for the sale of the goods, inasmuch as it did not at all appear by the contract who was the buyer; that all that could be gathered from the entries was, that they were contracts entered into by Bennett, to sell goods to persons not named, and who the persons were could not be supplied by oral evidence. There was a verdict for the plaintiff. On a motion to set it aside, the correspondence was held sufficient to connect the parties. It was then objected that the party who had not signed was not bound, as to which, MANSFIELD, C. J., said that the cases of *Egerton v. Matthews*, *Saunderson v. Jackson* and *Champion v. Plummer*, *supra*, "suppose a signature by the seller to be sufficient, and every one knows it is the daily practice of the court of chancery to establish contracts signed by one person only; and yet, a court of equity can no more dispense with the statute of frauds than a court of law can," and he held

that the verdict should be sustained. HEATH, J., was of the same opinion, and said there was a case in *Strange* by which it appeared that a voidable promise was sufficient to sustain a promise. LAWRENCE, J., after showing that it was evident that the contract was entered into by the authority of the defendants, said that objection would quite overturn the cases of *Egerton v. Matthews*, *Saunderson v. Jackson* and *Champion v. Plummer*, and the statute of frauds clearly supposes the probability of there being a signature by one person only.

Without multiplying cases, I will content myself with quoting the remarks of EARL, C. J., in the case of *Parton v. Crofts*, Com. Bench, N. S., vol. 16 (111 Eng. Com. Law, 11), where he, after discussing and considering the effect of bought and sold notes, in reference to the requirement of the statute of frauds, says: "To satisfy the seventeenth section of the statute, it is enough to produce a memorandum of the contract signed by the party to be charged thereby, or by an agent thereunto duly authorized."

This is recognized as the rule by the elementary writers. Chancellor KENT, in his commentaries, vol. 2, p. 510, says: "The signing of the agreement by one party only is sufficient, provided it be the party sought to be charged. He is estopped by his signature from denying that the contract was validly executed, though the paper be not signed by the other party, who sues for the performance."

Starkie, in his work on evidence, vol. 2, p. 614, says: "It is sufficient if there be a memorandum signed by the defendant, the vendor, although it be not signed by the plaintiff, the vendee, and although it could not have been enforced by the latter." See, also, Comyn on Contracts, at page 123. In view of the numerous decisions, both in this state and in England, it appears to me to be impossible now to hold a different rule, by giving a different construction to the statute of frauds.

Assuming, then, that the memorandum on which the present action is based is valid and binding on both parties at common law, and that the statute only requires it to be signed by the party to be charged, it appears to me to follow, as a necessary consequence, that the defendants, the vendors, in this case having, by their signature in writing, given the written evidence to charge them, are liable thereon; and that the nonsuit in the court below was improperly granted.

As, however, a majority of this court was unable to concur in a

judgment on the first argument, it may be proper to refer briefly to the opinion then read in affirmance of the nonsuit; and which has been presented to us on the present argument. It concedes that it is not necessary, under the requirements of the statute of frauds, that the contract should be signed by both parties; and that, prior to the statute, it would have been valid and binding upon both of them without being reduced to writing and signed by either. But the learned justice by whom it was delivered adds, that "the statute makes the contract void, although reduced to writing, as to the party not subscribing it; and it follows that the void promise of the latter furnished no consideration for the agreement of the party who subscribes it."

This appears to me to be a misconstruction of the statute. That does not define or prescribe what shall be necessary to constitute a contract. On the contrary, it assumes the existence of one that is valid and binding in all respects, and on that assumption declares that it shall be "void," not unlawful but ineffectual, of no binding force, to charge any of the parties with a liability thereon who does not subscribe a note or memorandum thereof in writing. It did not affect, nor was it intended to affect, an oral agreement, otherwise, or to a greater extent, than by the requirement of written evidence of its terms, by the signature or subscription of the party who was to be charged with a legal liability thereon. It is true that the party who does not sign or subscribe it may not be liable thereon in an action, as to which I deem it unnecessary to express an opinion; but that fact does not destroy or annul the consideration and terms which form the inducement of the other party to make it obligatory on himself, by compliance with all the requirements of the law to make it so. On the contrary, the same consideration continued without being impaired or annulled, and no new or further evidence of it was requisite.

It is too late for him, after executing an agreement conformable in all respects with the requirements of the law, and with the avowed intention to bind and charge himself, for the purpose of avoiding the liability thus voluntarily assumed, to say that the other party thereto cannot be charged thereon, on the sole ground that he himself did not take the precautionary means required by the law to charge such other party, either through neglect or in reliance on his promise to fulfill his part of it without being legally bound thereto.

The object of the statute is attained by protecting a vendor against

a liability, founded on oral evidence only of his contract, without relieving him from an obligation clearly assumed and created by a written evidence thereof, the evidence of which, under such circumstances, would make the statute the means of perpetrating fraud, as well as a protection against it, and against perjury or subornation of perjury. A construction that leads to such a result is not necessary, and is, in my opinion, unwarranted.

The substance of these views is tersely expressed by Parsons in his work on Mercantile Law, p. 78, where he, after considering the several clauses of the statute of frauds, says: "The operation of the statute in the clauses we have considered is not to avoid the contract, but only to inhibit and prevent actions from being brought upon it. In other respects it is valid."

Conceding it to be true that the consideration for a promise, as well as the promise itself, must be in writing to give any right of action thereon against a party who has signed it, as was decided in *Waine v. Waiters*, 5 East, 10, and in *Sears v. Brink*, 3 Johns. 210, it does by no means follow, that, when those and the other requisite elements to constitute a valid contract appear, it is also necessary that there should be a mutuality of obligation to give a right of action against either party.

Chancellor KENT, in *Clason v. Bailey*, 14 Johns. 488, *supra*, says, that, although Lord Ch. REDESDALE, in *Lawrenson v. Butler*, 1 Sch. & Lef. 13, had expressed the opinion that the contract ought to be mutual to be binding, and that if one party could not enforce it the other ought not, and that he himself had thought, and had often intimated, that the remedy ought to be mutual, yet it appeared from a review of the cases that it had been too well settled to the contrary to be now questioned.

It was subsequently (in 1836) said by TINDAL, J., in *Laythorp v. Bryant*, 2 Bing. (N. C.) 735, speaking of the clause of the English statute requiring an agreement for the sale of lands or any interest therein, or a note or memorandum thereof in writing, to be signed by the party to be charged therewith, or some other person thereunto lawfully authorized by him, that the party who has signed the agreement is the party to be charged, and he cannot be subject to any fraud; that there had been some confusion in the argument of the case, between the *consideration* of the agreement and the mutuality of claim; and, although it was true that the consideration must appear on the face of the agreement, yet he had found no

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2. That an action on such indorsements, the complaint in which sets forth, in addition to the ordinary allegations, the coverture of the defendant, a separate estate in her, and her intent to charge such estate, is maintainable.
3. That an ordinary pecuniary judgment in such action, as upon a personal contract, is proper. In order to make the indorsement of a married woman a charge upon her separate estate, all that is necessary is her declaration in the contract of indorsement or instrument creating the charge of her intent so to charge her separate estate. The charge need not be in such form as to create a specific lien.

APPEAL from the decision of the supreme court reversing the judgment for the plaintiff entered upon the report of the referee, and granting a new trial.

The action was brought upon three promissory notes, having upon each the special indorsement of the defendant, Armina Babcock, substantially in the following form :

"For value received, I hereby charge my individual property with the payment of this note.

"ARMINA BABCOCK."

At the time the notes were executed and indorsed by the respondent, Armina Babcock, which was in 1863 and 1864, she was a married woman (being the wife of the defendant, Edward Babcock), and the owner of a separate estate, consisting of real property. The other defendants were insolvent. The referee found that she made the indorsements for the benefit of the other defendants, Stephen E. and Edward Babcock, and that she had no interest in the transaction ; but made no finding that she intended to charge her separate estate. The action was in the ordinary form against maker and indorser of a promissory note, except that the above indorsement was literally copied, and the complaint alleged in Armina Babcock the possession of separate estate, and her intent to charge said estate.

The respondent raised by exception a number of objections to plaintiff's recovery, and also moved to dismiss the complaint as asking a personal judgment against a married woman ; as being improperly joined with the other defendants ; as not liable in such an action, but only, if at all, in equity ; as not proving an intent to charge her separate estate, etc.

The judgment was the usual general judgment in an action at law for a pecuniary sum as damages (the amount of the notes), and the costs of the action.

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R. A. Parmenter, for plaintiff and appellant.

E. Quackenbush, for defendant and respondent.

HUNT, Commissioner. Several objections are made to the plaintiff's right of recovery, which I will consider in their order:

1. It is said that the action is not proper in form; that it should be special under the statute, alleging the facts and asking that the separate property of the defendant be subjected to the payment of the debts in question. This objection is not valid. The complaint is special. The allegation of a separate estate in the wife, of her intent to charge it by the indorsements in question, together with proof of her separate estate, and of the insolvency of the other defendants, are all of a special character. They refer to the character of the defendant as a married woman. They would be quite unmeaning in an action upon an ordinary indorsement. Again, by the acts of 1860 (page 158), and the act of 1862 (page 344), a suit is authorized to be brought against a married woman "in all matters having relation to her sole and separate property * * * in the same manner as if she were sole;" and "a married woman may be sued in any of the courts of this state, and whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate property in the same manner as if she were sole." These provisions are incorporated into the code by amendments to sections 274 and 287. The facts are set forth, the proof is made, and the rights of the parties are properly before the court for adjudication.

2. It is argued that the contracts described in the complaint were not in fact for the benefit of Mrs. Babcock. The general subject embraced in this suggestion will be more fully considered under a subsequent point. It is sufficient to say, in answer to this specific objection, that neither the statute nor the authorities limit her ability to charge her estate to cases in which the contract is for her personal benefit. Her real and personal property are secured to her in the same manner as if she were a single female. Laws of 1848, p. 307. By the statute of 1860 the property of a married woman shall remain her sole and separate property, notwithstanding her marriage. Laws of 1860, p. 157. This property, both real and personal, she is authorized to sell, transfer and convey. *Ib.* It is further enacted by the same statute that a married woman may sue

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and be sued in all matters relating to her separate property, in the same manner as if she were sole. When a married woman assumes to act in reference to her separate estate, the question is not whether her action is really for her own benefit. The right to act and to bind her estate carries with it the right to act unwisely, and to her own injury, if she so wills. The fact that her action is for the benefit of her property is no doubt one ground on which it may be subjected. It is not, however, the only one.

I have considered these points with reference to our statutes, as, in my judgment, this case comes within those statutes; and the form of the action, the form of the judgment, and the execution upon it, are to be regulated by them. They are right in form, under the provisions of our statute.

3. The third objection, and which seems to have controlled the decision of the court below, is to the form in which the charge upon the estate is made. It is insisted, that the instrument creating the charge should contain a description of the property intended to be charged, or at least a reference by which it can be identified. The court below say: "If she attempted to make a deed or conveyance of her property in such a way, it would be plainly illegal; and, I think, neither of the acts of bargain, sale or conveyance, which, in the previous part of the same sentence (of the statute), she is empowered to make, would be well executed by a similar statement in writing, saying, 'For value received, I hereby bargain (or sell or convey) my individual property to A. B.' It appears to me it would be rejected for indefiniteness, as well as for non-compliance with the forms of law; and I am strongly inclined to think that the loose and indefinite language contained in this instrument is a decisive objection to its validity."

In announcing their conclusion to grant a new trial, the decision is based upon grounds thus expressed: "That there is no occasion or justification for any departure from the established principles and proceedings of a court of equity, which require, in order to make and enforce a valid charge, a specific description of the property in the instrument creating the charge, executed according to legal formalities, and enforced in equity under a complaint seeking as relief, not a general judgment, but the satisfaction of the charge out of the specific property subjected thereunto;" and, again, "that the act of 1862, empowering a married woman possessed of real estate as her separate property to bargain, sell and convey the same, and to enter

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into any contract in reference thereto, with the like effect in all respects as if she were unmarried, refers to such modes and forms of bargain, sale and conveyance of real estate, and contracts relative thereto, as were recognized as legal and were in conformity with the law as expounded in judicial tribunals at the time, and does not sanction a contract or charge of the kind now under investigation." The respondent's counsel clearly expresses the same idea in his first point, thus: "The contract does not specifically describe the separate property intended to be charged, and is therefore uncertain. A specific lien is not, in any manner or in any way recognized by the law, created on any particular property. There is no mortgage or pledge, or any absolute or conditional conveyance, of the separate estate." This proposition was sustained, not only in the present case, but by the general term of the fourth district in the case of *Kelso v. Tabor*, 52 Barb. 125. Entertaining great respect for the learned judges composing these courts, I have given to the question a careful and deliberate examination.

The act for the more effectual protection of married women, passed April 7, 1848, enacts as follows; "§ 1. The real and personal property of any female who may hereafter marry, and which she shall own at the time of her marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband nor be liable for his debts, and shall continue her sole and separate property as if she were a single female." Ch. 200, p. 307. The second section makes the same enactment as to the property of "any female now married," except that the same may be liable for the debts of her husband theretofore contracted. The third section, as amended by the act of 1849 (ch. 375, p. 528), enacts as follows: "Any married female may take, by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts."

The statute of 1860 (ch. 90, p. 157) re-affirmed, and in some particulars enlarged, this authority. In the third section thereof it is enacted, that "any married woman possessed of real estate as her separate property may bargain, sell and convey such property, and enter into any contract in reference to the same; but no such con-

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veyance or writing shall be valid without the assent in writing of her husband, as hereinafter provided."

By the act of 1862, ch. 172, p. 344, the instruction that the conveyance must be accompanied by the assent of the husband was repealed.

It will be observed that these statutes contain the expressions, "her separate property, as if she were a single female," and "to her separate use, in the same manner and with the like effect as if she were unmarried." The condition of a married woman, holding property to her separate use, as if she were *feme sole*, was well understood in the jurisprudence of this country at the time of the passage of these acts. It had been in use in England and in this country for a long time. It had been the subject of leading determinations for more than a hundred years. When the legislature use this well-known description, they use it with reference to its equally well-known meaning. To ascertain, therefore, whether a married woman can now and here subject her separate property to the payment of a debt like that before us, by an instrument like that before us, we must refer to the former adjudications respecting a married woman who held property as if she were a *feme sole*.

The first case in this state, where this general question of the rights of a married woman thus holding property arose, was that of *The Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. 77. The opinion of Chancellor KENT is learned and exhaustive, embracing a full review of all the English cases. He held, in substance, that the legal incapacity of the wife to convey or to bind her estate was relieved only so far as the language of the trust gave express power to dispose of the property; that she was authorized to dispose of the trust estate only in the manner expressly provided for in the instrument creating it. He held, therefore, that the disposition made by the wife and husband, by mutual assent, but without the formalities indicated in the deed of settlement, was invalid, and charged the husband with the sums received under that arrangement.

This case was carried to the court for the correction of errors, where it was elaborately argued by Thomas Addis Emmet and Baldwin for the appellants, and Samuel Jones and Harrison for the respondents. 17 Johns. 548. Opinions concurring in overruling the decision of Chancellor KENT were delivered by Chief Justice SPENCER and Judge PLATT. It was established, that a *feme covert*, with respect to her separate estate, is to be regarded as a *feme sole*.

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and may dispose of her property without the consent of her trustee, unless she is specially restrained by the instrument under which she acquires it; and, though a particular mode of disposition be pointed out in the deed of settlement, it will not preclude her from adopting any other mode of disposition, unless there are negative words restraining her power of disposition, except in the very mode so pointed out.

In the *North American Coal Co. v. Dyett*, 7 Paige, 9, the question was again before the court. By an antenuptial agreement, Mr. and Mrs. Dyett had conveyed a house and lot in the city of New York, belonging to the wife, to trustees upon the following trusts, among others: to sell and convey upon the written consent of husband and wife and invest the proceeds in other securities, with power of changing the same from time to time, upon like written consent. The proceeds were to be paid over as provided for in various contingencies. Among others, upon the insolvency of Mr. Dyett, "they were to be paid over by the trustees to the wife, to her sole and separate use, in like manner as if she were a *feme sole*. After sundry transfers, the estate became invested in a manufacturing establishment in Poughkeepsie, which was carried on for the benefit of the estate. Mr. Dyett, who had in the mean time become insolvent, and had been discharged under the insolvent act, acting as the agent of the trustees. The factory, being in need of coal for its work, purchased a cargo of the plaintiff, for which Mr. Dyett gave a draft of sixty days on Mr. Livingston, the formal agent of the factory. This draft was accepted by him, but was never paid. The plaintiffs filed their bill against Dyett and wife and the trustees, for the purpose of subjecting the trust estate to the payment of this debt and other similar claims. The bill was sustained and judgment given for the payment of the plaintiffs' debt. The case was carried to the court for the correction of errors, and was there affirmed. 20 Wend. 570. The chancellor lays down the rule thus: "The *feme covert* is, as to her separate estate, considered as a *feme sole*, and may, in person, or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate, or for her own benefit, upon the credit of the estate." He refers to numerous English cases, and to that of *The Methodist Church v. Jaques*, *supra*. In the court of errors, Mr. Justice COWEN, upon the point that Mrs. Dyett's admission in the answer that Livingston was her agent was not binding upon her, remarks: "It is said that such an answer is

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not to affect her interests, although she joined in it; that it is still but the answer of her husband; and this, I agree, is in general so. I am not aware, however, that the rule has ever been applied to a wife who is sued in respect to her separate estate. The bill is in the nature of an action at law against her for the recovery of a debt; and, although her person is not liable, she is proceeded against, in respect to her estate, as a *feme sole*. Having an estate which she is capable of charging by her contract in the first instance as a *feme sole*, it seems to follow, that her admissions, by way of answer or otherwise, are to be received in evidence against her. Where her separate estate is completely distinct, and, as here, independent of her husband, she seems to be regarded in equity, as respects her power to dispose of or charge it with debts, to all intents and purposes as a *feme sole*, except in so far as she may be expressly limited in her powers by the instrument under which she takes her interest." This action was against the wife in person, and settles these principles:

1. That the estate of a married woman is liable to the payment of a debt contracted for the benefit of such estate.
2. That the instrument contracting the debt need contain no description of or reference to such property intended to be benefited or held to be bound.

Yale v. Dederer came first before the court of appeals in 1858 (18 N. Y. 265). In that case Dederer had bought thirty-eight cows of the plaintiff, who refused to complete the sale, unless his wife would sign with him a note for the price of the cows. Mrs. Dederer did thereupon sign the note. An action was brought upon it against Dederer, judgment recovered, execution issued, returned unsatisfied, and an action then brought against the wife. She was proved to have a separate property in real and personal estate amply sufficient for the payment of the note. The judge, at the special term, ordered judgment against her, charging her separate estate with the payment of the note. The judgment was affirmed by the general term of the sixth district, and Mrs. Dederer appealed to the court of appeals. In delivering the opinion reversing this judgment, and in commenting upon the statute of 1848-'49, Judge COMSTOCK says "My conclusion, therefore, is, that, although the legal disability to contract remains as at the common law, a married woman may, as incidental to the perfect right of property and power of disposition which she takes under this statute, charge her estate for the purposes, and to the extent, which the rule in equity has heretofore sanctioned

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in reference to separate estates." Page 272. The judgment was reversed, upon the ground that the mere signing of a note by a married woman, not, in fact, for the benefit of her estate, but as surety for another, and not declared in the note to be for her benefit, and where she had not professed in the contract to charge such estate, did not operate as a charge upon her estate. This judgment was not unanimous—Judges DENIO and ROOSEVELT dissenting, and Judge STRONG not voting, doubtless upon the ground that it was in hostility to the English authorities.

The same case came again before the court of appeals in 1860. 22 N. Y. 450. The facts were as before stated, with two additions. It was found, first, that Mrs. Dederer became seized in fee of her real estate subsequent to the act of 1848; and, secondly, "that Mrs. Dederer intended to charge, and did expressly charge, her separate estate for the payment of the note." The court held, that, in order to charge the separate estate, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself. Judgment was ordered accordingly in favor of Mrs. Dederer.

In each of the examinations of *Yale v. Dederer*, as well as on each of the hearings of *The Methodist Church v. Jaques*, the body of the English law, in respect to separate estates of married women is brought in review, the opinions of the various chancellors are discussed, the discordant reasons upon which the law was maintained, the cases overruled, and that should be overruled, examined, but in the whole array is not to be found an authority that the contract of the married woman must contain a description of the estate she proposes to charge.

Owen v. Cawley, 36 N. Y. 600, was an action to recover for professional services rendered to a married woman, for the benefit of her separate estate. The defendant carried on a ship chandlery business under the agency of her husband, who employed the plaintiff to collect various demands arising out of the business. The court sustained the recovery against her, laying down the law in this language: "Where services are rendered for a married woman by her procurement, on the credit and for the benefit of her separate estate, there is an implied agreement and obligation, springing from the nature of the consideration, which the courts will enforce by charging the amount on her property as an equitable lien. Where a charge is created by her own express agree-

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ment for a good consideration, though for a purpose not beneficial to her separate estate, or even for the sole benefit of her husband, she is bound in equity by the obligation she thus deliberately chooses to assume." In that case there was not only no description of or reference to the separate property, but there was not even a written contract of any character.

In *Ballin v. Dillage*, 37 N. Y. 35, it appeared that Mrs. Dillage was a married woman having separate property, and that, in 1860, she purchased, at a mortgage sale, certain premises under a special agreement. Among other things, she recognized a prior mortgage upon the same premises, and agreed to pay the same, and secure such payment by a new mortgage, to be executed by herself. She secured a conveyance of the property and executed a new mortgage, omitting thirty-two lots, to which she secured an unincumbered title. Mrs. Dillage's mortgage was foreclosed in 1864, and, on the sale, there was a deficiency of more than \$600, which the plaintiff sought to make a charge against her other separate property. The plaintiff offered to prove that she had such other separate property to the value of \$10,000. The special and general term held that no judgment could be entered against her for the deficiency, deciding, as a matter of law, that a married woman is not personally bound by her agreement to pay the purchase-price of real estate which she purchases for her separate property, although she has a separate estate. *Id.* 37.

This judgment was reversed in the court of appeals, PARKER, J., delivering the opinion. He says: "I have no doubt, therefore, that in the case at bar, the obligation which the defendant took upon herself by the execution of the bond was for the benefit of her separate estate, which is, therefore, chargeable in equity with the payment of the deficiency in question. In such case, the liability attaches not as a specific lien on any particular portion of her estate, but upon the whole of it. Her separate estate, as a whole, becomes liable for any indebtedness contracted by her for its benefit to any extent." There was not only no description in this case of the property sought to be charged, but the liability arose upon the purchase of another piece of property, different and distinct from it.

Similar to this in its principle, and in the ruling upon it, was the case of *White v. McNett*, 33 N. Y. 371. The action was upon a guaranty executed by a married woman and her husband on the transfer of her mortgage, and the recovery against her upon the

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guaranty was sustained as a charge against her individual property. These are the material authorities in this State bearing upon the point under discussion. I will now refer to the English authorities. Mr. Clancy thus lays down the rule: "In the preceding chapters an attempt has been made to elucidate and explain the rule 'that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*;' and all the cases seem to concur in affixing this meaning to it, that, whenever a married woman acquires property to her separate use, exclusive of her husband, she may deal with it as she pleases, and may exercise over it every right which she could possess if she were unmarried." *Clancy's Husband and Wife*, 331, 2d Am. ed. 1837.

In *Norton v. Turvill*, 2 P. Wms. 144, the separate estate of a married woman was held liable for her bond for £25, made by her for money borrowed by her; and, in *Stanford v. Marshal*, 2 Atk. 68, where two married women joined their husbands in bonds for money, but it was ordered that the rents and profits be paid over to the creditors in liquidation of their debts. In *Hulme v. Tenant*, 1 Brown Ch. Cas. 16, the husband borrowed of the plaintiff £50, for which he gave as security a bond executed by himself and wife. The following year, having occasion for a further sum, the husband applied to the plaintiff for £130, which was advanced, and a new bond for £180 given by the husband and wife for the amount, the wife, at the same time, paying the interest on the former loan. On a bill filed to enforce the bond as a charge against the separate property of the wife, it was objected "that the security must be agreeable to the nature of the property; it must be a security which would be a lien upon it, such as a mortgage would be; that the act done by a married woman, in order to bind her estate, ought by some means to refer to it, but that the bond in the present case had no reference whatever to any property." Lord THURLOW said he had no doubt of this principle, that if a court of equity says that a *feme covert* may have a separate estate, the court will bind her to the whole extent as to making that estate liable to her own engagements, as, for instance, to the payment of debts; but he did not find that the court had ordered a power to be executed, they had only stopped the fund where the power was executed. He could not, therefore, order the power to be executed, but he was exceedingly clear that the leasehold was liable. A reference was ordered to take an account of the rents and profits, and

that the plaintiff's bonds should be paid therefrom. It is but just to say that this case was afterward questioned by Lord ELDON, in *Nantes v. Conock*, 9 Ves. 188, and *Jones v. Harris*, id. 497. Notwithstanding the doubts of Lord ELDON, this doctrine was subsequently reiterated in numerous cases. *Heateley v. Thomas*, 15 Vesey, 596, was this: William Johnson and Sarah Smith, a widow, intermarried. Previous to the marriage, a sum of £2,000 and an annuity to which Mrs. Smith was entitled, were vested in trustees for her sole and separate use, with power, by will or other writing, to dispose of the same as she should appoint. Mrs. Johnson made a will and appointment. She also executed a bond to the plaintiff as security for a person who afterward became bankrupt. A bill was filed against her executors and those of her husband, praying that her separate estate should be made liable to the payment of the principal and interest due by the bond to the plaintiff. After much argument, the case is thus stated: The principal question in this case was, whether the bond of the *feme covert*, during her coverture, could be considered a valid charge on the separate estate; and his honor (Sir WILLIAM GRANT) held that it was a valid charge, although she had a power of appointing only by will. Clancy, 103.

The case of *Bulpin v. Clarke*, 17 Ves. 365, was still later, and was to the same effect. Thus the property was conveyed to trustees, to receive the rents and profits and pay the same to such persons and to such uses as Margaret Clarke should during her life direct and appoint. The bill was filed against Clarke and wife and trustees, stating that she had borrowed £250 upon her promissory note, which she promised to repay out of her separate estate. It was argued that the note was not an execution of the power, as it had no reference to her separate property, and that a court of equity had no right to apply the rents and profits of the separate estate of a *feme covert* to the discharge of a debt. The decree directed the payment of principal and interest out of the separate estate. See also *Power v. Bailey*, 1 Ball & Beatty, 49, and *Clark v. Miller*, 2 Atk. 379; *Gregory v. Lockyer*, 6 Mad. 90; and the summing up of Mr. Clancy, at page 346 of his work. He says: "The present state of our law on this point of our subject seems to be this, that, if a married woman, having separate property, execute a bond or note, or any other instrument, by which she pledges herself for the payment of money, that property will be bound by her engagement, though the instrument which she has signed does not purport to be

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a lien upon that estate. But, on the other hand, that if the demand against her arise merely from an implied undertaking, then it cannot be executed out of such separate estate."

In *Murray v. Beebe*, 4 Simons, 82, it was held, that, where a married woman, having separate property, living apart from her husband, employed the plaintiffs as her solicitors, and promised them, by letter, that she would pay their bills, but did not refer to her separate property, her separate property was liable to pay the bills. The bill filed to enforce payment was demurred to, on the ground that the general engagement of a married woman does not affect her separate property, and that the letters contained no reference to her separate property. The demurrer was overruled.

In *Owens v. Dickinson*, 1 Craig & Ph. 48, the same rule is laid down, and it is held by Lord Brougham that the doctrine is applicable to all debts, whether written or verbal. The very recent case of *Mrs. Matthewmans*, Eng. Law Rep., 3 Eq. Cas. 781, 1866, and of *Butler v. Crumpton*, 7 ib. 16, 1869, reiterate the same doctrine. They were cases under the constitution acts, where the separate estate of the married woman was charged as a contributory, upon the ground that, in giving the order for the purchase of the stock, she had intended to charge her separate estate, and had done so. In neither case was there any description of the property intended to be charged.

In *Shattock v. Shattock*, 2 id. 182, 189, Lord ROMILLY lays down in substance the same doctrine, but insists upon the long contested proposition that the power of charging the estate arises from the power of appointment or disposition, and not the power to contract.

In *McHenry v. Davies*, 10 id. 88, Equity series, August, 1870, Lord ROMILLY held, where a married woman living abroad, alone, under circumstances which led to the belief that she was a *feme sole*, indorsed a bill of exchange and drew a check on her London bankers, for the purpose of enabling T., who acted as her agent, to raise money, the bill and check being cashed by a banker in Paris and dishonored, that the separate estate of the married woman was liable to make good the amount, and that the equities between herself and T. could not be inquired into.

Among all these cases there is not one that holds, that, where a married woman having separate property incurs a liability, for which she declares at the time of incurring it, and in the instrument by which it is incurred, that her separate estate shall be held, the separate property does not become charged; at least, I may say,

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after diligent examination, that I have met with no such case, either in the English courts or those of the last resort in this state. There are, however, several in which the precise objection has been made and overruled.

There is no more propriety in the principle sought to be sustained than there would be in holding that the promissory note of a male adult must describe the property seized on execution issued on a judgment recovered upon the note. In each case the note or bond creates a binding obligation. The law holds all of the property of the maker or obligor responsible for its satisfaction. The judgment, when recovered, creates the lien. When the proceeding was strictly one in equity, it may have been necessary that the judgment should specify the property against which the process should issue. Under our statutes, the suit, the judgment and the execution were in the ordinary manner of suits at law.

While, as has been seen, there has been some contest on the proposition whether a general engagement would subject the separate property of a married woman to the payment of her debts, the principal controversy has been as to the ground upon which their liability should be placed. On this point there will probably continue to be a difference of opinion. One statute (1860, p. 197) gives to the married woman formal authority to "enter into any contract in reference to the same." It may also well be rested upon the principle of *jus disponendi*. The law gives the married woman the practical ownership of the property. She has the power of dealing with it at pleasure. She therefore has the power to bind it for the payment of her debts.

Under our decisions the liability arises, *ipso facto*, where the debt is for the benefit of her estate. Where she incurs liability for another, there is required then the further condition that the intent to make the charge must be declared in the contract creating the indebtedness. *Yale v. Dederer, supra*. The English authorities do not require the existence of this condition. Her bond, in the ordinary form of a surety for another, will create a charge upon the estate. Authorities *supra*.

I do not see that the question whether the estate is legal or equitable, or whether it was secured before or after 1848, has any thing to do with the case. Under the English system trustees were not indispensable. The property might be conveyed to the wife directly, and for her separate use. 2 Roper on H. and W. 229. This would

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give her a legal estate. Under our laws the married woman may take "by inheritance, gift, grant, devise or bequest,"—words implying legal estates; and, when she has thus taken, she holds "to her sole and separate use, in the same manner and with the like effect as if she were unmarried." The equitable estate of a *feme sole*, under the old system, if that was its necessary form, defined the rights of a married woman now having control of a legal estate. Nor do I perceive how the time when she receives the estate can be important, except so far as there may be a claim by the husband or by his creditors, where the marital rights had attached prior to 1848.

Upon the whole case the order of the general term should be reversed, and the judgment of the special term affirmed, with costs.

EARL, Com., wrote an opinion reaching the same conclusion, except as to the form of the judgment entered upon the report of the referee.

The other commissioners concurred with HUNT, Com.

Order reversed.

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ACTION.

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ASSIGNMENT.

An insolvent debtor made a deed of assignment, wherein it was recited that the assignor "is indebted to divers persons, etc., and is desirous of providing for the payment thereof by assignment of *all* his property." And in the granting clause the property was described as "all his goods, etc., *chose in action* and property of every name and nature whatever belonging to him, and which are more particularly and fully enumerated in the schedule hereto annexed, marked schedule A." *Held*, that the general words of the deed were limited and controlled by the schedule, and that a sum of money not named in the schedule did not pass to the assignee under the deed. *Mims v. Armstrong*, 22.

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BAGGAGE.

1. The right of a traveler to recover of a carrier for lost baggage is not limited to such apparel or other articles as he expects to need or use by the way, but extends to such baggage as is ordinarily carried by passengers. *Dexter v. The Syracuse, etc., Railroad Co.*, 527.
2. The plaintiff purchased in New York, and checked over defendants' road, as baggage, a trunk and contents, consisting of wearing apparel for himself and wife, articles for members of his family, and cloth for some dresses, including one for his landlady. The trunk was lost, and in action to recover the value of it and contents, *held*, that defendants were liable, except for the cloth purchased for landlady. *Id.*

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1. The possession of goods acquired by plaintiff under a bill of lading is sufficient to maintain an action against one who does not show a better title. *Adams v. O'Connor*, 187.
2. Though the plaintiff had only a special property in the goods to secure advances made upon them, he can recover the whole value of them from a purchaser for cash, and hold the surplus beyond his own interest for the general owner. *Id.*

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BOUNDARY.

1. Where the legal line between two towns differs from the line universally recognized by the inhabitants of the towns, a deed describing a boundary in terms equally applicable to either line, contains a latent ambiguity, which may be cleared up by oral evidence. *Putnam v. Bond*, 83.
2. Although the presumption would be that the deed conveyed to the legal line, that presumption would be rebutted by proof that a different line had been adopted and universally recognized by the inhabitants of the two towns. *Id.*
3. There is no absolute presumption of law that parties to a deed intend to govern themselves by a boundary line adopted by towns or town officers, and which does not accord with the legal line; and where the words which they use are equally applicable to either, it is for the jury, upon a consideration of all the circumstances, to determine which line was actually meant. *Id.*

BREACH OF PROMISE.

- 1 The plaintiff and defendant entered into a contract to marry "in the fall." In October the defendant expressly refused to marry the plaintiff at any time.

Held, that an action for breach of the contract, commenced on the 25th of October, was not prematurely brought. *Burtis v. Thompson*, 516.

2. One who contracts to marry at a future day, and, before that day arrives, refuses to perform the contract at any time, is instantly liable to an action for breach of promise to marry. *Id.*

3. When the defendant, in an action for a breach of promise to marry, attempts to justify his breach by alleging in his answer, as the cause of his desertion, that the plaintiff has had criminal intercourse with various persons, and fails to prove the allegation, the jury have the right to take this circumstance into consideration in aggravation of the damages to which the plaintiff may be entitled. *Thorn v. Knapp*, 561.

BROKER.

A broker employed to sell real estate must produce a person who ultimately becomes a purchaser before he is entitled to his commissions, unless his failure to do so is occasioned by the fault of the vendor. *Richards v. Jackson*, 49.

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CHATTEL MORTGAGE.

A mortgagor of chattels in possession has a right before default to sell and deliver the mortgaged property subject to the mortgage, and if the purchaser dispose of it again before default in payment, and before demand of possession, he will not be liable for conversion. *Hathaway v. Brayman*, 534.

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COMMON CARRIER.

1 A corporation, established for the transportation of goods for hire between certain points, and receiving goods directed to a more distant place, is not responsible beyond the end of its own line, as a common carrier, but only as a forwarder, unless it make a positive agreement extending its liability. *Burroughs v. Norwich and Worcester Railroad Co.*, 78.

2. A station agent of a railroad corporation has not authority to bind such corporation as common carriers beyond the line of its own road, by signing

- receipts furnished in blank by a shipper, and by the terms of which the corporation undertakes to forward and deliver the goods to the order of the consignee at points on a connecting line, where it appears that such agent acted without special authority, and without the knowledge of the corporation, and that the officers of such corporation had furnished such agent with blank forms of receipts, to be given for goods shipped beyond their own line, by which it was provided, that, in case of loss or damage of the goods, the corporation only should be responsible in whose actual custody the goods should be at the time. *Id.*
3. A contract between two connecting lines of common carriers, which provides, among other things, that the gross receipts for transportation on the through line should be divided in a certain proportion between the two corporations, but that "loss or damage occasioned by injuries to person or property on said line shall be borne by the party having possession of the same at the time the injuries were done," gives a person who delivers goods to one corporation, to be transported to a point on the route of the other corporation, no right of action against the first corporation for the loss of the goods while in the possession of the second. *Id.*
 4. Where a plaintiff seeks to treat a "freight tariff" between points on two connecting lines, and which provides for the responsibility of "the line" for goods shipped over it, as a contract between himself and the defendants, varying what would otherwise be the legal liability of the latter, he is bound by its provisions, and a declaration in such tariff that "the line" will not be responsible in certain cases is controlling in those cases. *Id.*
 5. A common carrier may, by special contract, avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire occurring without fault on his part. *Grace v. Adams*, 181.
 6. A receipt, in proper form, delivered to the plaintiff by the defendants as their contract, with the terms and conditions expressed in the body of it in a way not calculated to escape attention, and its acceptance by the plaintiff at the time of the delivery of his package, without notice of dissent, authorized the defendants to infer his assent to the terms. *Id.*
 7. Where the consignor of goods is guilty of negligence, in not properly marking their destination upon them, common carriers are not liable for injuries arising from their being misssent. *Congar v. The Chicago and Northwestern Railway Co.*, 164.
 8. Where, through the negligence of the servants of common carriers, goods shipped over their line are not delivered to the consignee when called for by him, and they are afterward destroyed while in the freight department of the carriers, the latter are liable for the loss. *Meyer v. The Chicago, etc., R. R. Co.*, 207.
 9. The liability of a railroad company as a carrier for the baggage of a passenger terminates upon the expiration of such reasonable time, after arriving at the place of destination, as will enable the passenger to receive and take charge of his baggage. *Mote v. Chicago, etc., R. R. Co.*, 212.
 10. When the baggage is unclaimed within the proper time, it is the duty of the carrier to store it in a proper and secure place until called for, and, when so stored, the carrier becomes liable therefor as a warehouseman, and his liability as carrier ceases. *Id.*

11. In case of loss for which the carrier is found to be liable, interest is recoverable upon the value of the property from the day of its loss. *Id.*
12. A carrier's lien on goods transported is only co-extensive with his right to claim and recover freight. Therefore, where carriers have, by delay in transporting and delivering goods, injured the consignee to an amount equal to their charge for freight, their lien ceases, and the consignee may maintain replevin for the goods without paying or tendering the freight. *Dyer v. The Grand Trunk R. R. Co.*, 850.
13. Where goods were shipped over the line of common carriers, marked for a point beyond their line, and they gave a receipt therefor, wherein they agreed to forward and deliver the said goods, leaving the name of the consignee and the place of deposit blank,—*Held*, that the receipt constituted a special contract that the carriers would deliver the goods at the place of destination, even beyond their own route. *Outts v. Brainerd*, 858.
14. The responsibility of common carriers, as such, continues after the goods have reached their destination, until the consignee has had a reasonable time to call for, examine and take them. *Winslow v. Vermont, etc., R. R. Co.*, 365.
15. The plaintiffs were induced, by representations of one Collins, to send goods addressed to "J. F. Roberts, Roxbury, Mass." The goods were sent over the defendant's line. Collins then went to Boston, and claimed and received the goods of defendant, under the name of "J. F. Roberts," which name he had assumed for the purpose of getting the goods. There was no such person as "J. F. Roberts," and no person who was known or passed by that name. *Held*, that the defendants were liable to the plaintiff for the value of the goods. *Id.*
16. The plaintiffs shipped goods by vessel of defendants—common carriers—from England for New York, and received a bill of lading, providing that the defendants should not be liable for loss occasioned, among other things, by "any act, neglect or default whatsoever of the pilot, master, or mariners." On the arrival of the vessel in New York, the officer discharging the cargo, without authority from the plaintiffs, delivered the goods to a carman, who was not empowered by the plaintiffs to receive them, and the goods were thereby lost. *Held*, that the loss was the result of the gross carelessness of the defendants, and was not covered by the exceptions in the bill of lading. *Guthrie v. Hamburg, etc. Co.*, 512.

See BAGGAGE.

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See CONTRACT, 4.

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See CONSTITUTIONAL LAW, 1, 2, 8, 17; SEALED INSTRUMENT.

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See COMMON CARRIERS, 1, 8, 12.

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See SEALED INSTRUMENT.

CONSTITUTIONAL LAW.

1. By an act passed in 1868, it was provided that no person, not being a permanent resident of this state, shall sell, etc., within the limits of Baltimore, any goods, etc., other than agricultural products and articles manufactured in the state of Maryland etc., either by card, sample or list, without first obtaining a license so to do. The rate of license is \$300. *Ward v. State*, 50. *Held*, that such license is a tax upon a particular branch of business carried on in a particular mode within the limits of the state by a particular class of persons, and not a tax upon goods or merchandise imported into the state, either from foreign countries or from other states. *Id.*
2. Such a tax is not repugnant to that clause of the eighth section of article one of the United States constitution, which grants congress the power to regulate commerce among the several states. *Id.*
3. Such tax is not repugnant to the clause of the second section of article four of the United States constitution, which declares that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. *Id.*
4. Under the constitution there is no legislative power to endow public or municipal corporations with the faculty of subscribing to the stock of a railroad company, and to levy a tax on the inhabitants, to pay therefor. *Hanson v. Vernon*, 215.
5. The main ground of objection to acts authorizing such subscriptions is, that the debts thereby created will necessitate an additional tax upon the inhabitants and property owners within such corporation. *Id.*
6. The legislature may lawfully interfere with private property only in the following ways:
 1. It may authorize it to be forfeited for crime, or sold for its owner's debts, judicially established.
 2. Take it for *public* use under power of eminent domain, but then only on condition of making just compensation in *money*; but not for *private* use, even if it does make compensation.
 3. Condemn it under the *police* power when it endangers public health, welfare or safety.
 4. Take it by virtue of the taxing power. *Id.*
7. Taxation is a legislative power, and taxes are burdens or charges imposed by the legislature upon persons or property, to raise money for public purposes, or to accomplish some governmental end. They cannot be imposed for a private purpose. *Id.*
8. The foundation of the taxing power is political necessity. The circumstance that taxes are contributions demanded for the use of the government, and not for private uses, confers upon the power to tax its peculiar character. *Id.*
9. Legitimate taxation is without limit, and, unless there is some limit fixed by the constitution, the state may tax property to its full value. *Id.*

10. An act of the legislature may be unconstitutional in two ways; first, because it assumes or seeks to confer power not legislative in its nature; second, because it violates some specific provision of the national or state constitution. *Id.*
11. An act imposing taxes to aid in the construction of a railroad, owned and controlled by private corporations, is unconstitutional in both these ways. *Id.*
12. The power of taxation and of eminent domain are, in some respects, essentially different, and it does not follow that a tax can be levied for the benefit of a private corporation, though the enterprise be one that would justify the exercise of the right of eminent domain. *Id.*
13. Courts of justice are authorized to declare a legislative act unconstitutional, and void only when it violates the constitution, clearly, palpably, plainly, and in such a manner as to leave no reasonable doubt. *Stewart v. Supervisors of Polk county*, 238.
14. The right to exercise the power of eminent domain in behalf of railroads and other improvements of public utility is recognized by all the courts and denied by no one. The right to take private property under this power for public use is conditioned upon making compensation. *Id.*
15. The taxing power being one of the sovereign powers vested in the general assembly by the people, and not being limited either expressly or by clear implication in the constitution to the condition of making compensation, the judicial power possesses no authority to thus limit it. *Id.*
16. As the legislature may constitutionally exercise the right of eminent domain, which is limited by the constitution, in aid of the construction of railroads, etc., so, also, may it exercise the taxing power which is not thus limited. *Id.*
17. In a case of simple doubt as to whether a state law conflicts with the federal constitution, or not, the decision of the state court should be in favor of the validity of the state law. *Commonwealth v. Erie Railway Co., etc.*, 899.
18. In entering into the federal union the states parted only with some of the sovereign powers, all the undelegated and unprohibited ones being reserved to the states or the people thereof. *Id.*
19. Among the reserved state rights is that of eminent domain. Under this power railroads have been built, and the right to exact tolls and charges for their use is a necessary consequence of the power to construct them. This power may be exercised at the discretion of the state. *Id.*
20. A tax levied upon railroads and transportation companies within the state, generally at certain rates per ton upon all goods carried by them, and making no discrimination as to the source or destination of such goods, is not in conflict with the federal constitution. *Id.*
21. Such a tax, although the amount is determined by the number of tons carried, is not a tonnage tax. The tonnage of the federal constitution is one of capacity, not of weight. *Id.*
22. Nor does it attempt to regulate commerce between the different states; nor does it impose a duty upon imports and exports. *Id.*
23. The purpose of such a tax being to raise revenue, and not to regulate transportation, the right to impose it arises from the power to raise revenue, and not from a power to control commerce. *Id.*

24. A state law must act directly as a regulation of commerce before it will be pronounced unconstitutional. *Ib.*

25. The state of Pennsylvania imposed, by act of April 30, 1864, a tax of from two to five cents per ton upon all the freight traffic of all railroad, canal, etc., companies doing business in the state. *Held*, that the act was a lawful exercise of state power over creations and uses brought into existence by her own authority, and a proper tax upon the franchises granted by her. *Ib.*

See TENURE OF OFFICE.

CONTRACT.

1. Where parties treat by correspondence through the post, an offer by one is complete as soon as the letter containing notice of an acceptance is sent. *Wheat v. Cross*, 28.

2. The party making the offer is bound, when the other party has accepted it before the notice of withdrawal reaches him. *Ib.*

3. A mutual mistake as to a fact wholly collateral, and not affecting the essence of the contract, will not invalidate such contract. *Ib.*

4. An agreement by a creditor to accept, in satisfaction and discharge of a liquidated debt, a sum less than the full amount due, provided that no other creditor shall receive more than a like per cent on his claim, is void. *Perkins v. Lockwood*, 108.

5. The promise to pay for both past and future board at a certain rate is severable, and the plaintiff may recover for so much of it as is not within the statute. *Haynes v. Nice*, 109.

6. A creditor receiving payments without any direction as to application, may appropriate them to any debt not illegal, even if it would not support an action. *Ib.*

7. An oral contract between the owners of adjoining lots, limiting the use which one of them should make of his lot, or the manner in which he should build upon or occupy it, is within the statute of frauds, and therefore void. *Rice v. Roberts*, 195.

8. The sale and conveyance of land by the owner amounts to a revocation of an oral agreement between him and an adjoining owner, whereby the latter was to build on the line between the lands a party wall, and the former was to pay one-half the cost thereof, provided the adjoining owner has notice of the sale, and has not at the time commenced the erection of the wall. *Ib.*

9. If A. promise to pay B. a sum of money to do a particular act, and B. does the act, A. is liable, though B. did not at the time of the promise engage to do the act; for, upon the performance of the condition by the promisee, the contract is clothed with a valid consideration, which relates back, and the promise at once becomes obligatory. *Des Moines Valley R. R. v. Graff*, 256.

10. Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence of the requisite capacity, or, for his protection, estops the other party to set up and sustain this objection. *Allen v. Berryhill*, 309.

See BREACH OF PROMISE; EVIDENCE, 1, 2, 5; INSOLVENT LAW, 1; PARTNERSHIP, 4, 5; STATUTE OF FRAUDS.

CONVERSION.

See CHATTEL MORTGAGE; DOES, 2.

COVENANT OF TITLE.

1. In an action on a covenant of warranty in a deed of land, brought against the warrantor, after a judgment of eviction against the warrantee, the warrantor is not concluded from showing title in himself, unless he had due notice of the ejectment suit. *Somers v. Schmidt*, 191.
2. To have the effect of depriving the warrantor of the right to show title, the notice should be from the warrantee, should be unequivocal, certain and explicit, should request the warrantor to defend the title, and should be given in time to enable him to prepare for such defense. *Ib.*
3. Knowledge of the action and a notice to attend the trial is not enough to work an estoppel. *Ib.*

CRIMINAL LAW.

1. Where a prisoner has been convicted of several offenses, the court may give judgment upon each one of them; and, in doing so, may lawfully direct that the term of imprisonment for one shall commence at the expiration of that for another, and so on until all the terms have expired. *Petition of McCormick*, 197.
2. A false promise will not sustain a charge of crime or false pretense. It must be a representation in fact that is false, and this must be relied on by the party defrauded. But if a pretense and promise blend together, and jointly act upon the defrauded person, whereby he is induced to give faith to the pretense, the case is within the statute. *State v. Doves*, 271.
3. When D. pretended to H. that he had come to pay a debt due H., whereby H. was induced to make and deliver to D. a receipt, which D. immediately took and carried away without payment or consent of H.,—*Held*, within the statute. *Ib.*
4. In every case of homicide the people must prove the *corpus delicti* beyond a reasonable doubt, and if the prisoner claims a justification he must take upon himself the burden of satisfying the jury by a *preponderance of evidence*. *People v. Schryver*, 480.
5. But where the evidence introduced by the people tends to show that the homicide was justifiable, the prisoner may avail himself of that evidence, and has a right, without introducing affirmative proof, to have the question of justification submitted to the jury. *Ib.*
6. On the trial of an indictment for manslaughter, the court charged the jury that it was for the prisoner to satisfy the jury, "beyond a reasonable doubt" that the homicide was justifiable. *Held*, to be error. *Ib.*

See FORGERY; RECOGNIZANCE.

CROPS.

See EJECTMENT.

DAMAGES.

See BREACH OF PROMISE, 3; LESSOR AND LESSEE, 3; MALICIOUS PROMOTION; SALE OF LAND, 2; TELEGRAPH COMPANY, 6.

DANGEROUS INSTRUMENT.

See NEGLIGENCE.

DECLARATIONS.

See EVIDENCE, 6.

DEED.

1. Where a person, whose name has been subscribed to a deed in his absence, appears before a magistrate and duly acknowledges the execution of the deed, he thereby adopts the signature as his own. *Bartlett v. Drake*, 101.
2. Where parcels of land, not intended to be sold, are included in a deed through the fraud of the vendee, and no part of the consideration is paid or received on account thereof, the vendee may set up the fraud and avoid the conveyance of those parcels without returning the consideration paid or setting aside the entire deed. *Id.*

See ASSIGNMENT; BOUNDARY.

DELIVERY.

See SALE AND DELIVERY.

DIVORCE.

1. It is settled, that the injured party in the marriage relation must seek redress in the forum of the defendant, unless such defendant has removed from what was before the common domicile of both. *Elder v. Reel*, 414.
2. When a court has not jurisdiction, notice, or even process duly served, cannot give vitality to the judgment. *Id.*
3. At common law, adultery was no bar of dower, and, by the statute of Westminster (18 Edw. I, 1, c. 34), elopement or departure by the wife willingly from her husband, as well as adultery, is necessary to make the bar complete. *Id.*
4. J. E., the husband of A. E., after marriage, removed to another state—A. E. not accompanying him. While there, he procured a divorce, on the ground of the adultery of A. E. Subsequently, he became seized of certain real estate in Pennsylvania, to which he returned, and married another woman. A portion of this estate was conveyed by him to J. R., who purchased in good faith and without knowledge of J. E.'s prior marriage—the second wife joining in the conveyance. In the mean time A. E. was living and cohabiting with another man, claiming to be his wife. J. E.'s second wife having died, he became reconciled to A. E., and lived with her. Upon J. E.'s death, A. E. brought action for her dower in the real estate conveyed to J. R. *Held*, that she was entitled to dower, and that she was not estopped from claiming the same by reason of her acts and declarations, which could not have influenced J. R. in the purchase. *Id.*

See SUPPLICAVIT.

DOGS.

1. The regulation of the keeping of dogs, and the authorization of their summary destruction when prescribed regulations are not complied with, are within the police power of the legislature. *Blair v. Forehand*, 94.

2. An officer having a warrant from the proper authorities, directing him to kill all dogs not "licensed and collared," as required by statute, which statute provides that such dogs may be killed "whenever and wherever found," has a right peaceably to enter for that purpose, without permission, upon the close of the owner or keeper of such a dog, and there kill it. *Id.*
3. An officer who, under authority of law, kills a dog within the owner's close, and then leaves the body with the collar still on, is not liable for a conversion of the collar. *Id.*

DOMICILE.

See **INSANE PERSON**; **POST-NUPTIAL CONTRACT**; **SETTLEMENT**.

DOWER.

1. Where the wife unites with the husband in a mortgage of real estate belonging to him, and the property is sold under a decree of foreclosure, she is entitled to dower in the surplus only after the payment of the mortgage. *Bank of Commerce v. Owens*, 60.
2. Where the purchaser of the equity of redemption redeems the property, the widow is only entitled to dower by contributing her portion of the mortgage debt. *Id.*

See **DIVORCE**, 4.

DRIFT-WOOD.

See **FLOATING LOGS**.

EJECTMENT.

One who recovers land in an action of ejectment is entitled to the crops planted after the commencement of that action. *McLean v. Boese*, 185.

EMINENT DOMAIN.

The legislature cannot authorize the taking of private property for a private road without the consent of the owner, even if compensation is made therefor. *Osborn v. Hart*, 161.

See **CONSTITUTIONAL LAW**, 6, 12, 14, 16, 19.

EQUITY.

A court of equity may, in cases where the party is not entitled to specific performance, grant relief by decreeing the repayment of the money expended on the faith of the contract. *Green v. Drummond*, 14.

EVICTIION.

See **COVENANT OF TITLE**.

EVIDENCE.

1. Oral evidence is admissible for the purpose of applying the terms of a written contract to the subject-matter, and removing any ambiguity arising from such application. *Stoops v. Smith*, 85.
2. In an action on a written contract to pay "fifty dollars for inserting business card in two hundred copies of his advertising chart, to be paid when the

chart is published," etc., oral evidence is admissible to show, that, at the time the contract was made, the plaintiff agreed to make the chart of a certain material, and to publish it in a certain manner. *Id.*

3. Evidence that stock certificates, issued in the name of one as trustee, and by him transferred in blank, are constantly bought and sold in the market without inquiry, is inadmissible, as varying an established rule of law. *Shaw v. Spencer*, 115.
4. Parol evidence is admissible to show that a bill of sale of a vessel, absolute in form, is a mortgage. *Clark v. Washington Insurance Co.*, 185.
5. Parol evidence is admissible to show that by the word "barrels," used in a written contract, was intended vessels of a certain kind and capacity, and not a measure of quantity, and that the parties contracting had reference, not to a statute barrel, but to certain vessels of uniform size of different capacity from the statute barrel. *Miller v. Stevens*, 189.
6. Declarations of a testator, tending to show that his mind and faculties were impaired, and that a will was procured by undue influence, are admissible to impeach the validity of the will. *Bates v. Bates*, 260.
7. Parol evidence of a verbal agreement is competent, although written instruments have been subsequently executed in part performance of such agreement. *Barker v. Bradley*, 531.

See BOUNDARY; PROTEST, 1, 2.

EXECUTOR.

In this country the liability of an executor for a debt due his testator is not discharged, but the debt is, in his hands, general assets of the estate for the benefit of creditors, legatees and other parties interested. *Kaster v. Pierson*, 254.

FALSE PRETENSE.

See CRIMINAL LAW, 2, 3.

FALSE REPRESENTATIONS.

See SALE OF LAND, 2.

FENCES.

See RAILROAD COMPANY, 4.

FERRY.

A ferry license when granted becomes the property of the grantee, and is a private right, subject only to the governmental control growing out of its other nature of *publici juris*. When granted in an estate for years, the death of the grantee can no more terminate it than the death of a tenant can terminate a like estate in lands. *Leppencott v. Allander*, 202.

FIRE FROM SPARKS.

See PROXIMATE AND REMOTE CAUSE.

FIXTURES.

1. The question of fixture does not depend upon whether or not the foundation is let into the soil, but in the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act. *Meigs' Appeal*, 372.
2. The United States erected in the borough of York, upon ground dedicated as a public common, buildings for use during the war. *Held*, that the circumstances showed that these buildings were intended for temporary use and not as permanent structures, and that the borough, by lying by and suffering them to be erected upon a public common, where, as permanent structures, they would be nuisances, is estopped from declaring that the United States intended to annex their chattels to the freehold. *Id.*

FLOATING LOGS.

The owner of property which, without his fault or negligence, is carried by high water down a stream and deposited upon the lands of another, will not be liable for any damage occasioned by it, unless he reclaim it, in which event he must make good the damages done. *Sheldon v. Sherman*, 569.

FORECLOSURE.

See DOWER, 1, 2.

FORGERY.

The detachment of a written condition, made at the same time and upon the same paper, from a promissory note, if altering its character, and done fraudulently, is forgery. *State v. Stratton*, 262.

FORWARDER.

See COMMON CARRIER.

FRANCHISE.

See FERRY.

FRAUD.

See DEED; STATUTE OF FRAUDS.

GIFT.

See WILL, 2, 3.

GOOD-WILL.

See PARTNERSHIP, 2, 3

GUARDIAN.

See INSANE PERSON.

HAZARDOUS.

See INSURANCE, 1.

INDEX.

HEIR.

See WILL, 1.

HIGHWAY.

1. Mere slipperiness, arising from a smooth surface of snow and ice on a sidewalk, is not such a defect or want of repair as will render a city liable in damages for injuries sustained from a fall thereon. *Cook v. City of Milwaukee*, 183.
2. Where the gutters in a street are insufficient to carry off an unusually large quantity of water accumulated by artificial means, and the water overflows upon the walk and renders it slippery, the city will not be liable for injuries sustained thereby, unless it should appear that it was guilty of some subsequent negligence or default in not repairing the sidewalk thus rendered dangerous; or unless it be shown that the gutter was in such condition that the dangerous consequences to be apprehended from an overflow of the water were apparent. *Id.*
3. In an action against a city to recover damages for an injury sustained from a defect in the highway, it must be shown that the public authorities had notice of the defect, or that it was of such a nature, and had existed for such a length of time, that knowledge on their part must be presumed. *Goodenough v. City of Oakland*, 303.

HOMICIDE.

See CRIMINAL LAW, 4, 5, 6.

HUSBAND AND WIFE.

See DOWER, 1, 2.

INDORSEER.

See PROMISSORY NOTE, 6.

INDORSEMENT.

See PROMISSORY NOTE, 1.

INNKEEPER.

1. An innkeeper's liability arises from the nature of his employment. He is bound to take all possible care of the goods of his guests, intrusted to him or his servants. *Houser v. Tully*, 890.
2. Where a guest deposits money on the credit of the inn, with a person acting as bar-keeper, the innkeeper is liable for its loss, and whether the deposit was made on such credit is a question for the jury. *Id.*

INSANE PERSON.

The guardian of an insane person is a substitute for his ward with reference to all his interests, and has the right to change his domicile and to fix the locality of his person. *Anderson v. Estate of Anderson*, 834.

See CONTRACT, 10.

INSOLVENT LAW.

1. Where a contract is made between two citizens of the same state, within the state, and one of them afterward removes therefrom and becomes a citizen of another state, and the other then obtains a discharge under the provisions of an insolvent law of the state where the contract was made, which was enacted and in force before the date of the contract, such discharge is a bar to a suit upon the contract. *Stoddard v. Harrington*, 92.
2. A non-resident and non-assenting creditor is not bound by the debtor's discharge under state insolvent laws, no matter where the debt originated or was made payable. The citizenship of the parties governs, and not the place where the contract was made or was to be performed. *Hawley v. Hunt*, 278.
3. The discharge of the defendant, under the insolvent laws of New York, will not bar a suit upon judgments recovered against him in the state of New York, and, previous to his application for discharge, assigned to a citizen of Iowa. *Ib.*

INSURANCE.

1. An insurance policy, containing clauses which forbid the keeping by the insured upon his premises of "hazardous" articles, but which has indorsed upon it by the company permission "to keep one barrel of benzine or turpentine *in tin cans*," is not violated by the introduction of a barrel of benzine in a wooden barrel upon the premises, for the purpose of immediately emptying the same into a tin can. *Maryland Fire Insurance Co. v. Whiteford*, 45.
2. A policy of insurance against all marine risks is just as binding and effectual as if the risks are specified in detail. *Parkhurst v. Gloucester Mutual Fishing Insurance Co.*, 105.
3. Those risks include barratry of the master and mariners; and it is immaterial that the assured was the owner of the vessel and appointed the master and mariners. *Ib.*
4. An express warranty in a policy of insurance is a condition precedent, the burden of proving performance of which rests upon the insured. *McLoon v. Commercial Mutual Insurance Co.*, 129.
5. A warranty "that the vessel be commanded by a captain holding a certificate from the American Shipmasters' Association," means a valid and subsisting certificate. *Ib.*
6. The mortgagee of a vessel has an insurable interest, distinct from that of the owner, and can recover upon an insurance against barratry of the master, "unless the insured is owner of the vessel," even where the loss occurs by reason of such barratry. *Clark v. Washington Insurance Co.*, 185.
7. In an action upon a policy of insurance against accident, the question whether or not the injured party was guilty of negligence contributing to the accident, does not arise. *Schneider v. The Provident Life Insurance Co.*, 157.
8. Where the plaintiff was killed, while attempting to get upon a train of cars in slow motion, — *Held*, that it was not such wanton exposure as would excuse the company from liability under a provision in the policy that the company should not be liable for any injury happening to the assured by reason of his "willfully and wantonly exposing himself to unnecessary danger or peril." *Ib.*
9. Local agents of foreign insurance companies, appointed by a general agent located without the state, are to be considered general agents, and corpora-

tions represented by them are bound by their acts which are within the scope of the general authority they possess, though in violation of limitation upon that authority not brought home to knowledge of party dealing with them. *Miller v. Phoenix Insurance Co.*, 262.

10. A judgment is a general and not a specific lien, and the judgment creditor has no insurable interest in specific property of his debtor. *Greenmeyer v. Southern Mutual Fire Insurance Co.*, 420.

INTEREST.

See PARTNERSHIP, 1.

INTERNATIONAL LAW.

1. The act of congress (1861, ch. 3, § 5), concerning commercial intercourse with states in insurrection, and the proclamations of the president thereunder, do not extend to agreements made in those states, between persons being there, for the leasing of real estate therein, the payment of rent there, out of the products of the land, or the delivery of and payment for personal property already upon the demised premises, to be used thereon. *Kershaw v. Kelsey*, 142.
2. The subsequent unlawful forwarding of cotton raised on the land by the defendant's son does not affect the validity of the agreements contained in the lease. *Id.*

INTERSTATE TRAFFIC.

See CONSTITUTIONAL LAW, 1, 2, 3.

INTOXICATING LIQUOR.

See JURY.

JURY.

The drinking of intoxicating liquors by jurors after they have retired to consider their verdict is such misconduct as will cause the verdict to be set aside. *Ryan v. Harrow*, 302.

LANDLORD AND TENANT.

See LESSOR AND LESSEE.

LAW OF NATIONS.

See INTERNATIONAL LAW.

LEASE.

See LESSOR AND LESSEE.

LESSOR AND LESSEE.

1. Where a lessor and lessee of lands covenanted in the lease that, at the expiration of the term, the value of the buildings erected on the premises by the lessee should be appraised by appraisers and paid by the lessor,—*Held*, that the right of the lessee to recover for the value of the buildings was not entirely dependent upon the making of the appraisal, but that, nevertheless, he was bound to do all that was reasonably in his power to procure the stipu-

lated appraisement; also, that, in case the appraisers first selected failed to agree, the lessee must use all reasonable efforts in order to secure other appraisers; and that whether he has done so is a question for the jury. *Hood v. Hartshorn*, 89.

2. A covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land, by whatever form of words the agreement is made. *Mack v. Patchin*, 506.

3. The measure of damage for a breach of covenant for quiet enjoyment is the value of the unexpired term of the lease at the time of the eviction, over and above the rent reserved by the terms of the lease. *Id.*

LEGISLATIVE POWER.

When necessary to insure the public safety, the legislature may, under the police power vested in it, authorize municipal authorities to summarily destroy property without legal process or previous notice to the owner. *Blair v. Foreland*, 94.

See CONSTITUTIONAL LAW, 4, 6, 16.

LIBEL.

See SLANDER.

LIEN.

State laws, giving a lien on vessels for labor performed and materials furnished in their construction, are constitutional, and the enforcement of such liens belong to the state tribunals. *Foster v. The Richard Busteed*, 125.

See RAILROAD COMPANY, 1.

LIEN FOR FREIGHT.

See COMMON CARRIER, 12.

MALICIOUS PROSECUTION.

Where a civil suit is commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action for the damages sustained by him in the defense of that original suit, in excess of taxable costs obtained by him; and, to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment or by summons only. *Oleson v. Staples*, 316.

MARRIAGE.

See BREACH OF PROMISE; DIVORCE; POST-NUPTIAL CONTRACT.

MARRIED WOMEN.

Where a married woman, possessed of separate real estate, indorsed notes as surety for her husband, without consideration and without benefit to her separate estate, which indorsement purported, in terms, to charge her separate estate with payment,—*Held*,

1. That such indorsement was a sufficient charge upon her separate estate.

2. That an action on such indorsements, the complaint in which sets forth, in addition to the ordinary allegations, the coverture of the defendant, a separate estate in her, and her intent to charge such estate, is maintainable.
3. That an ordinary pecuniary judgment in such action, as upon a personal contract, is proper. In order to make the indorsement of a married woman a charge upon her separate estate, all that is necessary is her declaration in the contract of indorsement or instrument creating the charge of her intent so to charge her separate estate. The charge need not be in such form as to create a specific lien. *The Corn Exchange Ins. Co. v. Babcock*, 601.

MASTER AND SERVANT.

See WAREHOUSEMEN.

MEASURE OF DAMAGE.

See LAMBSON AND LEMMER, 8; TELEGRAPH COMPANY, 6.

MERGER.

See MORTGAGE, 8.

MILL OWNER.

See RIPARIAN RIGHTS.

MISTAKE.

Where money is paid by a party under the belief that facts are different from what they actually are, and the party is not in truth bound to pay the money, he is entitled to have the same refunded if duly diligent in giving notice of the mistake. *Citizens' Bank of Baltimore v. Grafton*, 66.

See CONTRACT, 3.

MORTGAGE.

1. A mortgage upon several lots is a common burden, and if the mortgagee, with knowledge that the mortgagor has aliened a portion of the lots, releases one of the other mortgaged lots, he thereby discharges the aliened lots to the extent of the *pro rata* value of the portion released. *Taylor v. Short*, 280.
2. But if the mortgagee could show that the mortgage was no lien on the released part, and that the owners of the other portion sustained no injury by such release, it would be otherwise. *Id.*
3. J. M. gave a mortgage on real estate to M. M., who on the same day duly assigned it to plaintiff. Subsequently, and after maturity of the mortgage, J. M. conveyed in fee the same premises to M. M., the mortgagee. M. M. thereafter conveyed the premises to the defendant. The mortgage was duly recorded soon after its date. The assignment and the deed from J. M. to M. M. were not recorded until after the date of the conveyance to the defendant. Nor was the assignment recorded until after defendant's deed. In an action to foreclose the mortgage—*Held*,
 1. That the conveyance of the mortgaged premises to the mortgagee did not merge the mortgage.

2. That the defendant was not entitled to protection as a *bona fide* purchaser, without notice of the assignment.

3. That the lien of the plaintiff's mortgage was not invalidated by reason of his neglect to have the assignment recorded until after the recording of the deed to the defendant. *Purdy v. Huntington*, 532.

See INSURANCE, 6; RAILROAD COMPANY, 1.

MUNICIPAL CORPORATION.

See HIGHWAY.

NATIONAL BANK.

The owner of shares of the stock in a national bank should be taxed therefor, in the city or town where he resides, and not in the city or town where the bank is located. *Clapp v. City of Burlington*, 355.

NEGLIGENCE.

A balance wheel, already made and in hand, having defects which weakened it, was sold by the defendant to a person who bought it for his own use. The defects in the wheel were pointed out to the purchaser, and fully understood by him. The wheel was used by the buyer for some years, and was then taken into the possession of the plaintiff's intestate, who used it for his own purposes. While so in use, it flew apart by reason of its original defects, and the plaintiff's intestate was killed. *Held*, that the seller was not guilty of such negligence as would make him liable in an action for causing the death of the plaintiff's intestate. *Loop v. Litchfield*, 543.

See COMMON CARRIER, 7, 8, 16; INSURANCE, 7, 8; PROXIMATE AND REMOTE CAUSE; TELEGRAPH COMPANY, 1, 8; WAREHOUSEMEN.

NEGOTIABLE INSTRUMENT.

See STOCK CERTIFICATE.

NON COMPOS MENTIS

See CONTRACT, 10.

OFFICE.

See TENURE OF OFFICE.

OFFICIAL BOND.

Where a person holds the same office for two successive terms, the sureties on his official bond for the second term are liable only for moneys actually in his hands at the time of his execution of the bond, or received by him subsequently thereto; but they are not liable for moneys reported by him, at the end of the first term, as in his hands, but which in fact he had converted to his own use. *Vician v. Otis*, 199.

PARTNER.

See PARTNERSHIP.

PARTNERSHIP.

1. In the settlement of partnership accounts between partners, there is no general rule as to interest, but the allowance or refusal thereof depends upon the circumstances of each case. *Gyger's Appeal*, 882.
2. A partner who is appointed by a firm to settle up the business of the firm after dissolution, and who continues the business of the firm upon his own account, is not liable to account to the firm for the value of the "good-will" thereof. *Id.*
3. Exclusive right in the business and sole ownership of it as against others are the criteria of property in good-will. *Id.*
4. A partner has no authority to bind his firm by an instrument under seal, even where the seal is not essential to the validity of the instrument. *Schmertz v. Stroves*, 489.
5. But where the contract is independent of the instrument, and has been executed on behalf of the firm, the making for the purposes of evidence of an instrument, under seal, by a partner, will not vitiate such contract. *Id.*

PART PAYMENT.

See PRINCIPAL AND SURETY.

PARTY-WALL.

See CONTRACT, 7, 8.

PAYMENT.

See CONTRACT, 4; MISTAKE; PRINCIPAL AND AGENT, 3.

PASSENGER CARRIERS.

See BAGGAGE; COMMON CARRIER.

PLEDGE.

See TRUSTEE, 2, 3, 4.

POST-NUPTIAL CONTRACT.

Where there is a marriage between parties in a foreign country, and a post-nuptial contract entered into respecting their property, which contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions. *Fuss v. Fuss*, 180.

PRINCIPAL AND AGENT.

1. The general rule, that notices to an agent is notice to the principal, is subject to the limitation that the notice must be to the agent when acting within the scope of his agency, and must relate to the business in which he is engaged by authority of his principal. *Congar v. The Chicago, etc., Railroad Co.*, 164.
2. To make the declaration of an agent binding upon his principal, it must be within the scope of the agency, and constitute part of the *res gesta*. *Sweetland v. Illinois, etc., Telegraph Co.*, 235.

3. *M.*, a resident of Virginia, held a policy of life insurance issued by the defendant, a foreign corporation, having a general agency and a sub-board of directors in New York, and paid his premiums regularly to an agent in Richmond, appointed by the New York agency. After the commencement of the war, arising from the rebellion of the southern states, the agent in Richmond received the premiums in confederate money, but made no return to the general agents in New York. Prior to the death of *M.* the defendants took no steps to revoke the authority of the Richmond agent. *Held*, in an action on the policy, that the defendant being a foreign corporation, the war did not operate as a suspension of the authority of their agent in Richmond.

Held, also, that the receipt by the agent of confederate money, in payment of the premiums, constituted a valid payment, and was binding on the company. *Robinson v. International Life Assurance Society*, 490.

PRINCIPAL AND SURETY.

1. While a creditor cannot release or compound with the principal debtor without discharging the surety, before a surety can be exonerated from his responsibility upon the ground that there has been an unauthorized indulgence given or composition made with the principal debtor, it must be shown that it has been effected by express agreement, founded upon a valid consideration and legally binding on the creditor. *Oberndorf v. Union Bank of Baltimore*, 81.
2. Part payment of the amount due will not discharge the surety, even where it is agreed that such part payment shall have that effect. Where a party is bound to pay a certain sum there is no consideration in contemplation of law for a promise that a less sum shall be received in satisfaction. *Id.*

PRIVATE ROAD.

See EMINENT DOMAIN.

PROBATE.

See WILL, 4.

PROMISSORY NOTE.

1. Where a promissory note, payable to the order of a person, is transferred by him before maturity, but not indorsed until after maturity, such indorsement does not relate back to the time of the transfer, but the transferee holds the note subject to all the equities between the original parties. *Lancaster National Bank v. Taylor*, 71.
2. A judgment against an indorser upon a note held as collateral security for such indorser's individual note, and settlement of claim against indorser upon such judgment, the judgment being thereupon assigned to the indorser, will not bar a recovery against him upon the individual note. *Burnheimer v. Hart*, 209.
3. The rule, that a promissory note, payable on demand, with interest, is a continuing security, does not apply between holder and maker. *Horrick v. Worcester*, 461.
4. Therefore, a note, payable on demand, with interest, transferred nearly three months after date, is past due when transferred, and subject to all the defenses that would have been available if the suit had been by the original payee. *Id.*

5. A. executed and delivered to plaintiff his promissory note, in which no time of payment was specified, at the same time agreeing to procure M. to sign the note as surety, if at any time the plaintiff should desire it. The plaintiff accepted the note upon this agreement. A few months after, the plaintiff desired the additional security, and A. procured M. to sign the note, and returned it to plaintiff. No new consideration then passed between any of the parties. *Held*, LOTT and SUTHERLAND, JJ., *dissentients*, that M. was liable as surety on the note. *McNaught v. McCloughry*, 487.
6. A party will be protected as holder of negotiable paper, although fraudulently transferred, when he has received it before maturity, without notice of the fraud and in good faith, and parted with something of value for it at the time of its transfer. *The Park Bank v. Watson*, 578.
7. The defendant was the maker of accommodation notes for the benefit of W., and to be used by W. for a specific purpose. Instead of using them for that purpose, W. lodged the notes with the plaintiff as collateral security for a previous debt not yet due, and in lieu of other collateral notes then past due and protested. *Held*, that the plaintiff was a *bona fide* holder for value and entitled to recover. *Id.*

See FORGERY; MARRIED WOMEN; PROTEST.

PROTEST.

1. A protest of a notary is *prima facie* evidence of the truth of its statements, and, when exclusively relied on to prove the necessary facts, must contain sufficient averments that every thing requisite has been done to authorize the demand upon the indorser. *People's Bank v. Brooks*, 11.
2. When the protest merely states that the note was presented for payment, but does not say *where*, the statement is insufficient to charge the indorser. *Id.*

PROXIMATE AND REMOTE CAUSE.

A warehouse, situated near the railroad track, was set on fire by sparks from one of plaintiffs' locomotives. The burning warehouse communicated fire to defendant's hotel (situated thirty-nine feet distant), whereby it was consumed. *Held*, that the plaintiffs were not liable for the destruction of the hotel, or property therein, by reason of the injury being too remote. *Pennsylvania Railroad v. Kerr*, 481.

RAILROADS.

See CONSTITUTIONAL LAW, 4, 25.

RAILROAD COMPANY.

1. Where a railroad company, in pursuance of a power in its charter to borrow money and to execute the required securities therefor, executed a mortgage on its road, etc., and on "all future right thereto and interest therein to be acquired,"—*Held*, that such mortgage was a valid lien on all lands over which the road was at the time located, though the title thereto or right of way was not acquired until subsequently; and that it was prior to the lien of the vendor of such right of way for the purchase-money. *Pierce v. Milwaukee, etc. Railroad Co.*, 208.

3. Where a land owner agrees with a railroad company upon the compensation to be made for lands over which the road is laid, and permits the company to take possession of the land and construct their road thereon, it is too late for him to take advantage of the omission of the company to record the survey, as required by its charter. *Troy & Boston Railroad Co. v. Potter*, 335.
3. The owner of the land adjoining a railroad, and from whom the land was taken for the construction and use of the road, under the power conferred by the charter, has no right to enter upon the land after it is so taken, and while it is being so used, and cut and take therefrom the herbage and other products of the soil growing thereon. *Id.*
4. The obligation upon railroad companies to build a fence along their road only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers there. *Bemis v. Connecticut, etc., Railroad Co.*, 339.
5. In an action against a railroad company, in favor of the owner of an animal killed, while unlawfully on the track, by a train of cars running at the usual rate of speed, the mere fact that the speed of the train was not checked while approaching the animal does not tend to show want of ordinary care. Nor does the mere fact that the engineer did not discover the animal until the engine was close to it show want of such care. *Id.*
6. In such case, the first duty of the company and its servants is to provide for the safety of the passengers and property on the train. Its next care may be for the safety of its own property; and, lastly, it must exercise such a degree of care as is consistent with the prior objects, to avoid injury to the trespasser. *Id.*

See COMMON CARRIER.

REBELLION.

See INTERNATIONAL LAW.

RECEIPT.

See COMMON CARRIER, 6.

RECOGNIZANCE.

1. Where a recognizance for the appearance of a principal is joint, and not several, the failure of the principal to appear is a breach of the condition, and it is not necessary to call upon the bail to produce the body of such principal. *Mishler v. Commonwealth*, 877.
2. Where the recognizance has been forfeited by a breach of its condition the forfeiture is not rendered invalid by a subsequent respite of the recognizance. *Id.*
3. Where the condition of the recognizance is that a prisoner shall appear and not depart the court without leave, the mere appearance of the prisoner, and the departure without leave, does not release the surety. It is at all times in the discretion of the court, at any stage of a criminal trial, to call the defendant and forfeit his recognizance. *Id.*

REFERENCE.

1. Courts of equity have a general jurisdiction where there are mutual accounts, and also where the accounts are on one side, but a discovery is sought, and is

- material to the relief. But where the accounts are all on the one side, and mere set-offs on the other, and no discovery is sought or required, courts of equity have not jurisdiction. *McMartin v. Bingham*, 265.
2. Fourteen items, under eight different dates, and two credits, the account being all on one side and no discovery sought, and the defenses being denial, payment and the statute of limitation, will not deprive the parties of a right to a jury trial. *Id.*

RELEASE.

See MORTGAGE, 1, 2.

REPLEVIN.

See COMMON CARRIER, 12.

RIPARIAN RIGHTS.

- A mill owner has the right, in a reasonable manner, to discharge the waste from his mill, such as sawdust, shavings, etc., into the stream, in the ordinary course of using such mill; but he has not the right, wantonly and needlessly, and out of the ordinary course in such cases, and not in the service of his substantial interest and benefit in the use of his mill in a reasonable manner, to throw such waste, or permit it to go into the stream, to the injury of inferior heritors. *Jacobs v. Allard*, 331.

SALE AND DELIVERY.

1. The plaintiffs purchased of defendants a quantity of corn, parcel of a specified cargo, then stored in a warehouse, paid the price therefor, and received a receipted bill of sale. The defendants thereupon drew an order upon the superintendent of the warehouse, for delivery to plaintiffs of the quantity of corn from the specified cargo, and the superintendent on receipt of the order gave defendants his order for the delivery of said corn to plaintiffs, which order was delivered to plaintiffs. A few hours after, and before the presentation of said order, the warehouse was destroyed by fire, and with it the grain. *Held*, in an action to recover back the price paid, that the sale and delivery were consummated, and the loss, therefore, on the plaintiffs. *Russell v. Carrington*, 498.
2. Upon a sale of a specified quantity of grain, its separation from a mass, undistinguishable in quality or value in which it is included, is not necessary to pass the title, when the intention to do so is otherwise clearly manifested. *Id.*

SALE OF LAND.

1. Parol evidence is not admissible to prove a warranty of the quantity of land conveyed by deed. *Cabot v. Christie*, 313.
2. Where a vendor of land, with intent to induce the sale, makes representations as to the quantity, as of his own knowledge, and the vendee is thereby induced to purchase, the vendor is liable for any damage which the vendee may sustain by reason of a deficiency in the quantity as represented, although such representations are believed to be true by the vendor when made. *Id.*

See CONTRACT 8; MORTGAGE, 2.

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SEAL.

See PARTNERSHIP, 4.

SEALED INSTRUMENT.

1. Under the statute of Iowa the want of consideration in a sealed instrument may be inquired into, and this does not except instruments made in other states. *Williams v. Haynes*, 268.
2. This statute affects all sealed contracts made after its passage. It relates to the remedy, and does not impair the obligation of the contract, within the meaning of the adjudications of the United States supreme court. *Id.*

SENTENCE.

See CRIMINAL LAW, 1,

SERVANT.

See INNKEEPER.

SETTLEMENT.

1. The settlement of the parents determines the settlement of an unemancipated child, and, where the head of the family changes his settlement, that of his children changes with him. This is the case when, upon death of the father, the mother becomes head of the family. *Burrell Township v. Pittsburg, etc.*, 441.
2. N. W., the widowed mother of A. K. W., removed from the township of Burrell, where she had a settlement, to Pittsburg. She there leased a house, and resided in it until her death. In the meantime A. K. W. became deranged, and after the death of his mother became a pauper. *Held*, that by the act of the mother changing her settlement, that of A. K. W. was also changed, and that Burrell township was not liable for the support of the pauper. *Id.*
3. Although the father and mother stand upon a different footing as to their children, in relation to private parties, in regard to the public their standing is the same. *Id.*

SIDEWALK.

See HIGHWAY.

SLANDER.

It is a question for the jury to determine whether answers given by a person in the course of his testimony as a witness, and claimed to be slanderous, were so given under the belief that they were pertinent and relevant to the question at issue, or from malice. *White v. Carroll*, 508.

SPECIAL CONTRACT.

See COMMON CARRIER, 5, 6, 12.

STATE POWER.

See CONSTITUTIONAL LAW.

STATUTE OF FRAUDS.

1. An agreement, whereby G. and D. agree to become jointly purchasers of certain real estate, each party to furnish one-half the purchase-money, and to hold the same in undivided moieties, is within the fourth section of the statute of frauds, and if not evidenced by some memorandum in writing, signed by the party to be charged, will not be enforced. *Green v. Drummond*, 14.
2. Where, in pursuance of such an agreement, a purchase was made in the name of D. alone, although G. advanced a portion of the purchase-money a conventional trust that could be enforced was not created, the same being within the provisions of the seventh section. *Id.*
3. There being no deed or conveyance of the legal title to D., while the contract of purchase remained executory, no resulting trust within the meaning of the eighth section of the statute could arise in favor of G. *Id.*
4. An oral promise by A. to pay a debt of B., provided C. will discontinue a suit pending against B. for its recovery, is void, under the statute of frauds. *Duffy v. Wunsch*, 514.
5. An oral promise by B. made to C., and upon consideration passing between him and C., to pay a debt due from C. to the plaintiff, is a valid promise, and the plaintiff can maintain an action thereon. *Barker v. Bradley*, 521.
6. The plaintiff brought action for the non-performance of an agreement contained in the following memorandum, signed by the defendants: "New York, 18th May, 1861. We agree to deliver P. S. Justice one thousand Enfield pattern rifles, with bayonets, no other extras, in New York, at eighteen dollars each, cash upon such delivery; said rifles to be shipped from Liverpool not later than 1st July, and before if possible. W. BAILEY LANG & Co." *Held*, that this memorandum was a sufficient compliance with the requirements of the statute of frauds to bind the defendants. That there was a good and sufficient consideration for their obligation, and that the plaintiff was therefore entitled to recover. *Justice v. Lang*, 576.

See CONTRACT, 7

STATUTE OF LIMITATION.

1. A parol promise by defendant not to plead the statute of limitation if plaintiff will allow him further time on a claim that is nearly outlawed, does not estop the defendant from setting up the statute in a suit brought upon that claim. Such promise, not being in writing, is not under the code such an acknowledgment of indebtedness as will relieve the note from the operation of the statute of limitation. *Shapley v. Abbott*, 548.
2. A party may waive the benefit of a statute founded in public policy, by omitting to set up the defense of the statute, but he cannot make a valid promise in advance to waive the benefit of such statute. *Id.*

STOCK CERTIFICATE.

A certificate of stock transferred in blank is not a negotiable instrument. *Shaw v. Spencer*, 115.

SUPPLIQUITE.

1. Origin and character of the writ of *supplicavit* stated. *Adams v. Adams*, 111.

2. Courts of equity will not entertain a petition for such writ where the party applying therefor has grounds for a divorce *a mensâ* because of ill-treatment, although she has conscientious scruples against applying for a divorce. *Id.*

SURETIES.

See OFFICIAL BOND; PRINCIPAL AND SURETY; PROMISSORY NOTE, 5; RECOGNIZANCE.

TAX.

See CONSTITUTIONAL LAW.

TAXATION.

1. An act of the legislature, authorizing a town to raise by tax a sum of money for the use and benefit of a private educational institution, is unconstitutional and void. *Curtis' Adm. v. Whipple*, 187.
2. The fact that an educational institution is incorporated does not render it public, so far as relates to the power of taxation for its aid. *Id.*

See NATIONAL BANK; CONSTITUTIONAL LAW.

TELEGRAM.

See TELEGRAPH COMPANY.

TELEGRAPH COMPANY.

1. A telegraph company, notwithstanding special printed conditions at the head of the dispatch sent, exonerating it therefrom, is responsible for mistakes happening in consequence of its own fault, such as want of proper skill or ordinary care on the part of its operators, or the use of defective instruments, but is not, under those conditions, responsible for mistakes occasioned by uncontrollable causes, such as atmospheric electricity, provided these mistakes could not have been ascertained and guarded against, or prevented by the exercise of ordinary care and skill on the part of the operating agents of the company. *Sweelland v. Illinois, etc., Telegraph Co.*, 285.
2. Telegraph companies cannot adopt general printed rules, exacting, as a condition of sending messages, that the sender shall exonerate or release the company from damages caused by defective instruments, or by want of proper skill in the operators, or by their failure to use due care. *Id.*
3. A condition, requiring a party who desires a message to be sent with absolute correctness to have the same repeated, is a proper one, and where the condition as to repeating exists, and is known to the party, or where he is bound to take notice of it, and a mistake occurs in an unrepeatable message, the mere proof of such mistake, without some other evidence of carelessness on the part of the company, will not make it liable. It must be shown that the mistake was caused by the fault of the company. *Id.*
4. A telegram, written upon a printed form containing certain terms, and subscribed by the sender, amounts to an agreement on the part of the sender that the telegram shall be sent according to such terms. *Wolf v. Western Union Telegraph Co.*, 387.
5. A condition that a telegraph company "will not be liable for damages in any case where the claim is not presented in writing sixty days after sending the

message," is neither contrary to law, unreasonable, nor contrary to public policy. *Ib.*

6. Plaintiffs' agent in Chicago telegraphed to his agent in Oswego for 5,000 sacks of salt. By the carelessness of the operator the telegram was made to read "casks;" and 5,000 casks were sent, for which there was no market in O., and which were sold at a loss. In an action against the telegraph company for damages arising from the mistake,—*Held*, that the measure of damage was the difference between the market value at O. and at C., together with the cost of transportation from O. to C. GROVER, J., *dissentiente*. *Leonard v. The New York, etc., Telegraph Co.*, 440.

Held, also, that the failure of the plaintiffs' agent at Oswego to attempt to withdraw the shipment, on learning the mistake, after the goods had been shipped, and, as he supposed, had actually gone, but, in fact, as afterward appeared, before they had gone, was not such legal negligence as would prevent the plaintiffs' recovering. *Ib.*

Per HUNT, J. Where a telegraph company receives a message to be transmitted to a point beyond its own line and on a connecting line, it undertakes for care and attention in transmitting it over its own line, and for its prompt delivery to a competent and responsible company for further transmission. When so delivered its liability terminates, and that of the receiving company begins.

A telegraph company is not liable as a common carrier, but only for want of proper care and attention. *Ib.*

TENURE OF OFFICE.

1. The Pennsylvania legislature established the twenty-ninth judicial district, by act of 28th February, 1868, under which act J. G. was elected and commissioned president judge of the district. By an act passed March 16th, 1869, the former act was repealed, and the district was abolished. *Held*, that the act of 1869 was invalid, as being an attempt, substantially, to abolish the office of president judge of the twenty-ninth district. *Commonwealth v. Gamble*, 422.
2. The term of the judicial office is fixed by the constitution, and it is beyond the power of the legislature to diminish it. *Ib.*
3. The powers, authority and jurisdiction of an office are inseparable from it. The legislature may diminish the aggregate amount of duties of a judge, by the division of his district, or otherwise, but must leave the authority and jurisdiction pertaining to the office intact. *Ib.*

TESTIMONY.

See SLANDER.

TONNAGE TAX.

See CONSTITUTIONAL LAWS, 17, 25.

TRANSFER OF CAUSE.

1. An order of a state court, transferring a cause to the federal courts under the act of congress of March 2, 1867, is an appealable order, and the State courts have jurisdiction to hear and determine the appeal. *Akerly v. Vilas*, 166.

2. Where there has been a trial in an action at law, or a final hearing in a court of equity, and an adjudication upon the merits, it is too late to remove the cause into the federal court under said act, notwithstanding the fact that the judgment may have been reversed on appeal and the cause remanded for new trial or further proceedings. *Ib.*

TRIAL BY JURY.

See REFERENCE.

TRUSTS.

1. Where a trust results by operation of law, as, for instance, where there is a devise or bequest to a person "upon trust," and no trust is declared, etc., in such cases the trust results to the heirs at law or personal representatives, and extrinsic evidence will be rejected. *Saylor v. Plaine*, 84.
2. Where one known to be a trustee pledges that which is known to be trust property, to secure his own debt, the act is *prima facie* unauthorized, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. *Shaw v. Spencer*, 115.
3. Where one holding certificates of stock in his name, as "trustee" pledges the same as security for his own debt, the term "trustee" is a sufficient notice of a trust, and the pledgee who takes the certificates without inquiry does so at his peril. *Ib.*
4. The owner of stock certificates, fraudulently pledged by one holding them as trustee, is not estopped from claiming them of the pledgee by standing by, after having notified the pledgee of his claim and demanding the stock, and without protest witnessing the pledgee pay an assessment theretofore made on the stock. *Ib.*

See STATUTE OF FRAUDS, § 8.

TRUSTEE.

Trustees holding notes, given by other parties for the benefit of a railroad corporation, cannot refuse to surrender such notes to the beneficiary, simply on the ground that a condition named in such notes, the failure to comply with which would render them void, had not been complied with. *Des Moines Valley R. R. v. Graff*, 256.

See TRUSTS.

USAGE.

To permit usage to govern and modify the law in relation to the dealings of parties, it must be uniform, certain and sufficiently notorious to warrant the legal presumption that the parties contracted with reference to it. *Citizens' Bank of Baltimore v. Grafflin*, 66.

VENDEE.

See DEED, 2.

VENDOR AND PURCHASER.

If a vendee allow a vendor to remain in possession, or, after a formal delivery immediately restore the possession to him, and he afterward sell and deliver

the goods to a *bona fide* purchaser for value, without notice of the prior sale, such purchaser is entitled to the goods against the first vendee and all claiming under him. *Davis v. Digler*, 398.

This rule depends upon neither the statute 18 Eliz. ch. v, nor statute 27 Eliz. ch. iv, but upon the circumstance that the vendee, by suffering the vendor to remain in possession, enabled him to commit a fraud upon innocent third persons. *Id.*

The rule of law, that the retention of possession of personal property is conclusive evidence of a colorable sale, is a rule of policy required for the prevention of fraud, and is to be inflexibly maintained. *Id.*

VERDICT.

See JURY.

VESSELS.

See LIEN.

WAIVER.

See STATUTE LIMITATION.

WAREHOUSEMEN.

1. Warehousemen are responsible for due care in storing the goods intrusted to them in a place of reasonable safety, and are to be charged only upon proof of their own negligence, or that of their servants in the course of their employment. *Aldrich v. Boston and Worcester Railroad Co.*, 76.
2. Where servants of warehousemen are present during the destruction of the warehouse by fire in the night-time, their neglect to remove goods from the warehouse is not such negligence as will charge the warehousemen, unless it be shown that such was a part of the service for which the servants were engaged. *Id.*

WARRANTY.

See COVENANT OF TITLE; INSURANCE, 4, 5; SALE OF LAND.

WIFE.

See DOWER

WILL.

1. The heir is always to be favored at law, and not to be excluded on mere conjecture. On the contrary, there must be satisfactory evidence of an intention to give a beneficiary interest to the devisee. *Saylor v. Plaine*, 84.
2. Where a gift is to take effect in possession immediately upon the death of the testator, words of survivorship refer to that time. *Branson v. Hill*, 40.
3. Where the gift is not immediate, there being a prior life carried out, but words of perpetuity qualify those of survivorship, the survivor will not take the whole gift to the exclusion of the heirs or representatives of his co-legates. *Id.*

- 4 The burden is on the proponent of a will, not only to prove the due execution thereof, but also the testamentary capacity of the testator. *Williams v. Robinson*, 359.

See EVIDENCE, 6.

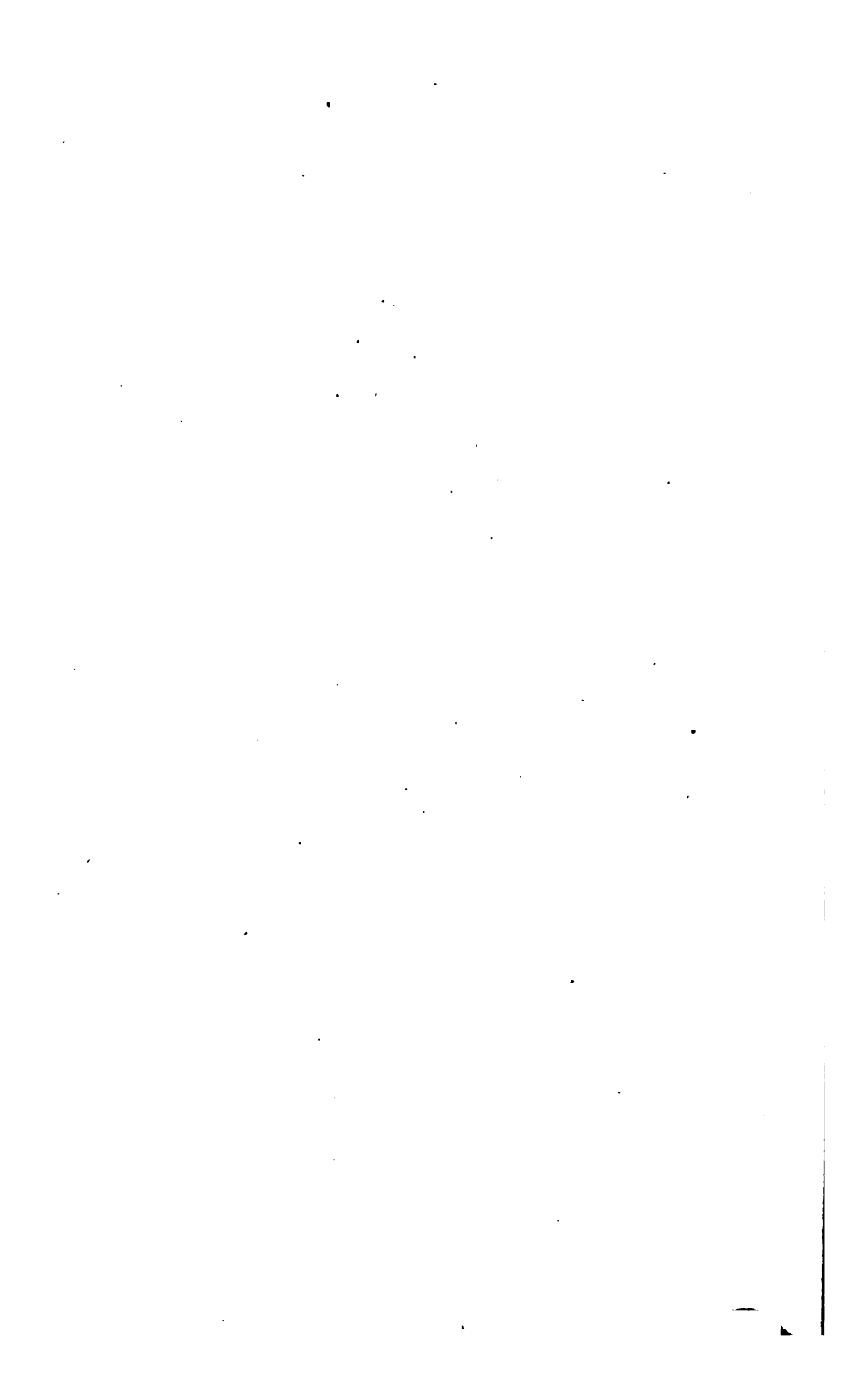
WITNESS.

See SLANDER.

WRONG DELIVERY.

See COMMON CARRIER, 15, 16.





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